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Supreme Court, U.S.
FILED
09-647 NOV 27 2009
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
Petitioners,

COMMODITY FUTURES TRADING
COMMISSION
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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Date: November 27, 2009

QUESTIONS PRESENTED

1. Is a commodity trading account *in the name of* an entity alleged by the Commodity Futures Trading Commission to be a "commodity pool" an essential material fact to any finding that a commodity pool exists?

2. Is the existence of a "commodity pool" a logical, factual and legal necessary prerequisite to any finding that a commodity pool "operator" exists as that term is defined by the Commodity Exchange Act?

3. Did the Third Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings when it failed to address the threshold summary judgment issue of petitioners' appeal?

4. Was the Third Circuit Court's failure to address the threshold summary judgment issue raised by the appeal of the *pro se* petitioners a denial of both equal protection and due process of law?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioners here and the Appellants in the United States Court of Appeals for the Third Circuit are Robert W. Shimer, ("Shimer") a citizen of the United States and resident of the Commonwealth of Pennsylvania, Vincent J. Firth, ("Firth") a citizen of the United States and resident of the State of New Jersey and Equity Financial Group, LLC ("Equity") a New Jersey limited liability company.

The Respondent is the Commodity Futures Trading Commission ("CFTC") the federal agency civil plaintiff. Other parties to the civil action in the District Court that generated the appeal of Petitioners are the individual defendants Coyt E. Murray ("Murray") and J. Vernon Abernethy ("Abernethy") and the corporate defendants associated with Murray: Tech Traders Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.

Pursuant to Rule 29.6, Petitioners are not affiliated with any of the other above stated corporate entity defendants. All of the above stated corporate entity defendants including Petitioner Equity are privately held. They are not owned by a parent company or any publicly held company owning 10% or more of their stock.

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Robert W. Shimer, Vincent J. Firth and Equity Financial Group, LLC respectfully petition this Honorable Court for a Writ of Certiorari to review the Panel Opinion and Judgment of the United States Court of Appeals for the Third Circuit affirming the various opinions of the District Court and rejecting their petition for rehearing.

OPINION BELOW

The Opinion of the Court of Appeals (App. 3a-29a) affirming the judgment of the District Court was reported at 572 F.3d 150 (3rd Cir. 2009). The denial of Petitioners' Petition for Rehearing (App. 57a-58a) was not reported. The two separate opinions and orders of the District Court (App. 32a-41a; App. 44a-52a) denying Shimer and Firth's motions for summary judgment were reported respectively at 2005 WL 2864784 (D.N.J. Oct. 4, 2005) and 2006 WL 3359418 (D.N.J. Nov. 16, 2006).

JURISDICTION

The opinion of the Court of Appeals affirming the final Opinion of the District Court was entered July 13, 2009. Petitioners' petition for rehearing was denied by the Court of Appeals on September 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

U.S. Constitution Amendment 5
(Appendix, page 62a)

28 U.S. C. § 1291
(Appendix, page 62a)

7 U.S.C. § 1a(5)
(Appendix, page 62a)

17 C.F.R. § 4.10(d)(1)
(Appendix, page 63a)

Trading specific regulations of the CFTC applicable to commodity pools and their operators:
17 C.F.R. § 4.22 (Appendix pages 64a- 66a)
17 C.F.R. § 4.23 (Appendix pages 67a-68a)
17 C.F.R. § 4.24 (Appendix pages 69a-77a)
17 C.F.R. § 4.25 (Appendix pages 78a-81a)
(Note: portions of the above CFTC regulations that refer to trading by the pool and/or its operator or require the same for compliance are highlighted in bold for easy review.)

STATEMENT

Subject matter jurisdiction for the District Court is found in Section 6c of the Commodity Exchange Act as amended (hereinafter "CEA"), 7 U.S.C. § 13a-1 (2002) which authorizes the Plaintiff Commodity Futures Trading Commission ("CFTC") to seek injunctive and other relief in the United States District Courts against any registered entity or other person that appears to be engaged in a violation of any provision of the CEA or any rule, regulation or order promulgated thereunder.

Petitioner Equity Financial Group, LLC ("Equity") a New Jersey limited liability company managed the non-defendant entity Shasta Capital Associates, LLC ("Shasta") a Delaware limited

liability company. Petitioner Robert W. Shimer ("Shimer") was attorney for both Shasta and its manager Equity. Petitioner Vincent J. Firth ("Firth") was the manager of Equity. Shasta was one of many corporate entities (unaffiliated with each other) that all entered into separate investment agreements with the defendant trading entity Tech Traders, Inc. ("Tech"). As attorney for the entity Shasta, Shimer forwarded member investment funds directly to Tech from his attorney escrow account at Citibank.

A civil action was filed on April 1, 2004 in the United States District Court for the District of New Jersey by the CFTC alleging various violations of the CEA. The CFTC Amended Complaint filed August 12, 2004 alleged that Equity acted as the commodity pool "operator" of the alleged "commodity pool" entity Shasta despite the fact that Shasta and its manager Equity never engaged in commodity futures trading and never represented to any of Shasta's members that Shasta or Equity intended to engage in any such trading.

Petitioners Shimer and Firth were alleged by the CFTC to be "associated persons" of the commodity pool operator ("CPO") Equity and, therefore, subject to the full enforcement authority of that federal agency. The CFTC also alleged violations of the CEA and regulations thereunder by the defendant Coyt E. Murray ("Murray"), his trading company Tech and the other corporate defendants affiliated with Murray and or Tech: Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd. The defendant J. Vernon Abernethy, ("Abernethy") a CPA local to the trading

operation of Tech hired by Murray to verify Tech's monthly trading performance was also alleged by the CFTC to have violated the CEA and regulations thereunder.

The corporate defendants Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., and the individual defendants Murray and Abernethy settled with Plaintiff CFTC and executed consent agreements. Petitioners Equity, Shimer and Firth refused to execute any consent agreement with the CFTC.

Petitioners were initially represented by the New York law firm of Menaker & Herrmann until that firm withdrew representation of Shimer and Firth in the spring of 2005. The District Court refused to allow withdrawal for the corporate defendant Equity. Shimer and Firth, acting *pro se,* began to defend themselves and both separately filed the first of two pre-trial motions for summary judgment with respect to all counts of the CFTC's Amended Complaint (hereinafter "Motions").

The first separate properly prepared Motions meeting all requirements of the Federal Rules of Civil Procedure and the District Court's Local Rules were filed supported by Shimer's brief on July 8, 2005. That brief cited to the decision of the Ninth Circuit Court of Appeals in *Lopez v. Dean Witter Reynolds, Inc.* 805 F.2d 880 (9th Cir. 1986). The Ninth Circuit Court in *Lopez* was presented with a question similar to the one in the present matter: was the defendant a CPO subject to the provisions of

the CEA as alleged by the plaintiff? The *Lopez* Court answered that question by first enumerating four very specific tests for determining if a commodity pool exists under any particular set of facts.

The fourth "test" of the *Lopez* Court was derived from and followed logically from the specific language contained in the other three tests. That fourth "test" required commodity futures trading transactions to be traded "...by a commodity pool operator *in the name of the pool* rather than in the name of an individual investor." (Emphasis added). *Lopez v. Dean Witter Reynolds, Inc.* supra, at 884.

Citing to this Court's decision in *Celotex Corp. v. Catrett* 477 U.S. 317 (1986) Shimer argued that summary judgment was appropriate and should be granted if an essential material fact to the non moving party's case was missing from the record and could not be established at trial. All other "facts" introduced or alleged by the CFTC were immaterial if there was no trading account (and therefore no trading) in the name of the alleged pool entity Shasta as specifically required by the fourth test of *Lopez*. The District Court denied Shimer and Firth's separate Motions in an opinion filed October 4, 2005. (See App. 32a-41a)

On April 7, 2006 Shimer and Firth filed two separate new Motions supported by duly certified relevant documentation from the case of *CFTC v. Heritage Capital Advisory Services, Ltd., et al* Comm. Fut. L. Rep. (CCH) ¶ 21,627, 26,379 (N.D. Ill. 1982) ("Heritage") obtained by Shimer in October, 2005 from the Federal Records Center in Chicago.

The brief filed by Shimer in support of those two new separate Motions reiterated once again the necessity of summary judgment for Shimer and Firth with respect to all counts of the CFTC's Amended Complaint if the entity Shasta was not a "commodity pool" per all prior federal case law summarized in *Lopez*. Shimer's brief continued to argue that in the absence of a "commodity pool" it was factually and legally *impossible* for Shasta's manager Equity to be the "operator" of a commodity pool and subject to the registration requirements of the CEA. Shimer pointed out to the District Court that Shasta not only failed the fourth test of *Lopez* but arguably failed at least three if not all four "tests". The District Court reprinted basically the same opinion issued a year earlier and, once again, on November 16, 2006 denied both Motions (see App. 44a-52a).

In both opinions the District Court departed from prior clear and unequivocal Ninth Circuit federal case law precedent *and concluded what no federal court had ever concluded since the establishment of the CFTC by Congress*: that an entity such as Shasta (that had never opened a commodity trading account in its name and had never traded commodity futures contracts or *indicated to anyone* any intention to do so) was, nevertheless, a "commodity pool" thereby requiring CFTC registration by Shasta's manager Equity as a commodity pool "operator" (CPO).

The District Court issued an Opinion reported at 2006 WL 3751911 (D. N.J. Dec. 18, 2006) granting partial summary judgment for the CFTC. The District Court acknowledged near the bottom of page

5 of that Opinion (App. 55a) that Shasta's status was "...the threshold issue for bringing this action under the jurisdiction of the CFTC." [1]

Shimer and Firth first filed motions for reconsideration citing the untenable nature of the three reasons given both times by the District Court for concluding that Shasta was a "commodity pool". When the reconsideration motions were granted but their Motions were again denied Shimer and Firth filed motions for disqualification and also filed a Writ of Mandamus with the Third Circuit Court on January 4, 2007 asking that District Judge Robert B. Kugler be removed from the case and replaced. On February 1, 2007 their mandamus petition was denied. On February 9, 2007 Shimer and Firth filed a joint notice of appeal from the District Court's denial of their separate second round Motions.

Shimer and Firth argued their appeal satisfied all three requirements of the "collateral order" doctrine exception to the general rule that denials of summary judgment are generally not appealable. The Third Circuit Court rejected that argument and dismissed for lack of appellate jurisdiction on July 6, 2007. (App. 59a-60a) A bench trial with respect to the remaining counts of the Amended Complaint was held in late August and early September of 2007. The District Court's final Opinion dated February 4, 2008

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[1] Only the first page (App. 54a) and pages 5 & 6 (App. 55a-56a) of the District Court Opinion granting partial summary judgment to the CFTC are produced in the Appendix. Pages 5 & 6 reflect the District Court's continuing recognition of the importance of Shasta's status for the summary judgment motions of Shimer and Firth.

granting judgment to the CFTC on all remaining counts of the Amended Complaint is reported at 537 F. Supp. 2d 677 (D.N.J. 2008).[2] Petitioners all filed separate timely Notices of Appeal. In addition to the final order (and all other intermediate District Court orders relevant to them) Shimer (joined by Firth) specifically appealed the two Opinions and Orders of the District Court that denied the separate Motions (App. 100a). All appeals of Petitioners were consolidated by the Third Circuit Court. (App. 2a)

Shimer entered an appearance on behalf of the corporate entity Equity in late July of 2008. Shimer filed a timely appeal brief on behalf of himself *pro se* and on behalf of his client Equity joined by Firth who also filed *pro se*. That appeal brief cited to an attached multi-volume 850+ page Appendix that, in part, contained Petitioners' summary judgment arguments and the opposing arguments offered to the District Court by the CFTC.

The CFTC filed a brief in opposition and Petitioners filed a brief in reply. Oral argument was heard by the Panel on March 3, 2009 and a Panel Opinion reported at 572 F.3d 150 (3rd Cir. 2009) affirming the judgment of the District Court was issued on July 13, 2009. (App. 3a-29a) A petition for rehearing en banc was filed on August 26, 2009. On September 9, 2009 that petition was summarily denied (App. 57a-58a). This petition for writ of

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[2] The text of that lengthy final opinion of the District Court is not reproduced in the Appendix because it did not again address or discuss in a substantive way the threshold "commodity pool" summary judgment issue that is the focus of this petition.

certiorari was filed timely prior to the December 8, 2009 ninety day deadline.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS APPROPRIATE WHENEVER A COURT OF APPEALS ABANDONS LOGIC AND COMMONSENSE AND INTERPRETS A FEDERAL STATUTE IN A WAY THAT CREATES A FOUR FOLD UNNECESSARY CONFLICT IN THE CIRCUITS.

Rule 10 of this Court advises certiorari writ petitioners that "...certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law". This petition alleges neither though as a side note petitioners dispute the adequacy of the record to support *many* of the appellate court's fact based conclusions.

The conflict that now exists between the Third Circuit and both the Ninth and Second Circuits arises *not* because the Panel *misapplied* the appropriate rule of law standard when the issue is whether a particular defendant is subject to the provisions of the CEA. *This petition is brought because a conflict between the circuits was created by the Panel's willingness to abandon both logic and common sense in order to completely avoid the appealed dispositive threshold "commodity pool" summary judgment issue.*

A. The Third Circuit Panel Opinion conflicts with the Ninth Circuit's conclusion about the sufficiency of the statutory definition of CPO for determining whether a particular entity is subject to the provisions of the CEA.

In *Lopez* the district court had granted the defendant Dean Witter's motion for summary judgment on the plaintiff's claim that Dean Witter had violated the CEA by inducing her to invest in Dean Witter's Commodity Guided Account Program. The *Lopez* Court affirmed the district court's grant of summary judgment for the defendant Dean Witter. On appeal by the plaintiff, the Ninth Circuit approached the issue of whether or not Dean Witter had violated the CEA by stating:

> "(i)n order to determine whether the commodity accounts which Appellants held with Dean Witter were subject to the provisions of the statute, our first inquiry must be whether Dean Witter was running a commodity pool subject to the requirements of the Commodity Exchange Act, 7 U.S.C. Sec 1, et seq. (1982)" *Lopez v. Dean Witter Reynolds, Inc.* supra at 883.

The Ninth Circuit recognized the inherent logic and common sense necessity of first determining if a "commodity pool" was being "operated" before it was possible to conclude whether or not the defendant Dean Witter had violated the CEA as an alleged commodity pool operator ("CPO").

The *Lopez Court* noted at that same page 883 that the statutory definition of CPO [now found at 7 U.S.C. § 1a(5)] (App. 62a) provided little assistance in resolving that question. The Ninth Circuit found the statutory definition of CPO insufficient *on its face* for determining whether Dean Witter was subject to the provisions of the CEA. Noting that the CFTC regulations tracked the statute, the *Lopez* Court concluded at that same page 883 that it faced "an undecided question".

The issue presented to both the *Lopez* Court and the Third Circuit Panel was basically the same: whether the District Court's determination with respect to a defendant's prior motion for summary judgment should be affirmed when applicability of the CEA was alleged by the plaintiff. The only difference is that in *Lopez* the defendant Dean Witter and its attorneys *had been successful* before the District Court. In the present matter the summary judgment motions of the *pro se* defendants Shimer and Firth had been denied.

The Third Circuit Panel came to a completely different conclusion than the Ninth Circuit about the sufficiency of the statutory definition of CPO. The Third Circuit engaged in no credible analysis of whether the entity Shasta was a "commodity pool", *and conducted no review of the legislative history of those sections of the CEA that specifically apply to CPO's.* The Panel determined that the Petitioner Equity was a CPO based solely on the language of the statute. That conclusion turned on its interpretation of the following phrase found at 7 U.S.C. §1a(5): "...*for the purpose of trading* in any

commodity for future delivery..." (Emphasis added). (App. 63a).

There are two ways of interpreting that phrase. As Petitioners pointed out in their petition for rehearing the most logical and common sense interpretation is that the phrase was intended by Congress to mean for the purpose of trading *by the entity being defined by the statute.* In other words Congress clearly intended that entities that "operate" commodity pools would *usually* be engaged in trading for and on behalf of the "pools" they operate. Could the name "commodity pool *operator*" be any clearer in conveying exactly what CPOs do?

This interpretation of the statute is consistent with the legislative history of the CEA,[3] CFTC regulations specifically directed at commodity pool operators,[4] CFTC regulations specifically directed to required commodity pool trading related disclosures[5], all prior "pool" federal case law and the sworn testimony of the CFTC's own expert witness in

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[3] Only Shimer offered a credible analysis of the legislative history of *those specific provisions that apply to CPOs. (See pages 26-33 of DDE # 334)(App.84a-93a).* The record reflects no such in depth "CPO related analysis" of the CEA by the CFTC, the District Court or the Panel.

[4] See extensive highlighted portions of the CFTC's regulations found at 17 C.F.R. §4.22, 17 C.F.R. §4.23 and 17 C.F.R. §4.24 in the Appendix (App. 64a through 77a). Compliance with many of those regulations by a pool's operator *would be virtually impossible without an intimate knowledge of the pool's trading!*

[5] See App. 78a-81a for highlighted extensive regulations found at 17 C.F.R. § 4.25.

the *Heritage* case[6] found in the record below in Exhibit E attached to Shimer's second summary judgment brief (part of DDE Entry #334) filed on April 7, 2006. This interpretation is also consistent with the summary judgment argument continuously made *in every pre-trial brief* filed by Shimer since April 14, 2005.

The Panel chose, instead, to interpret the critical statutory phrase "...for the purpose of trading..." to mean *"for the purpose of trading" by some entity other than the entity being defined!* This particular "interpretation" is specifically contradicted by all the authorities just cited.

Citing in its Opinion only to the language of 17 C.F.R. §4.10(d)(1) the Panel contends in the last sentence of the first paragraph of footnote 13 found on pages 16-17 of its Opinion (see App. 16a-17a) that its interpretation of 7 U.S.C. §1a(5) is supported by the CFTC's regulations: "We note, however, that the regulations appear to comport with the interpretation we give the statute." How the Panel was able to arrive at that particular conclusion in the face of the highlighted portions of extensive CPO regulations of the CFTC (see App. 64a-81a) is a mystery.

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[6] The relevant portions of the sworn testimony of CFTC expert Charlotte Ohlmiller in the *Heritage* case (see App. 94a-98a) were cited in Petitioners' appellate brief and were specifically available to the Panel in Petitioners' appellate brief Appendix. Her CPO related expert testimony was ignored by both the Appellate Court and the District Court.

B. The "statutory definition approach" of the Third Circuit Panel for determining whether a CPO exists under any particular set of facts conflicts with the Ninth Circuit's common sense approach of first determining if a "commodity pool" is being operated.

If an entity is alleged to be the operator of "something" common sense dictates that an inquiry into the possible existence of that "something" should be the first step in resolving whether the allegation is true. Before concluding that the statutory definition of CPO was insufficient on its face for resolving its summary judgment issue the *Lopez* Court noted the practical common sense necessity of first determining if a commodity pool was being operated. *Lopez v. Dean Witter Reynolds,Inc.* supra at 883.

Lopez stands, in part, for the simple, clear and common sense proposition that a court must first determine if a "commodity pool" exists under any particular set of facts before it can logically conclude that a commodity pool was being "operated" in violation of the registration provisions and other provisions of the CEA.

As Petitioners pointed out in their petition for rehearing the legitimacy of the *Lopez* Court's "approach" is confirmed by a review of both the CFTC's Original Complaint and the Amended Complaint. The CFTC clearly understood *the critical importance* of the status of Shasta as an alleged "commodity pool" for establishing its CPO allegation with respect to Shasta's manager Equity. The CFTC Original Complaint (DDE #1) alleges Shasta to be a

"pool" 16 times and alleges the members of Shasta to be members of a "pool" 20 times. In the Amended Complaint (DDE #64) these allegations are made 18 times and 10 times respectively. If the CFTC was not convinced that Shasta's status as a "pool" was *critical* to its CPO allegation with respect to Equity, why did it initially cite to *Lopez* (and cases cited by *Lopez*) in support of its *numerous* "pool" allegations with respect to the entity Shasta?[7]

Because the Ninth Circuit understood the inherent logical necessity of first determining if a "pool" was being "operated" the *Lopez* Court *did not spend any time at all* trying to decipher or analyze the statutory language of the definition of CPO found at 7 U.S.C. § 1a(5). And it is relatively clear from the *Lopez* decision that even if that court had found the actual language of the statute to be more helpful than it was, the necessity of first directing a commodity pool analysis to the entity being "operated" was considered a logical and necessary common sense first step to resolving the CEA issue presented.

In its willingness to focus solely upon the language of the statute the Panel Opinion ignored and therefore placed itself in conflict with far more than the common sense approach of the Ninth Circuit. As pointed out in the petition for rehearing

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[7] See second and third pages of the filed document that is a part of DDE #5 (CFTC Brief In Support of Preliminary Injunction (DDE #5) (App. 82a-83a). The third filed page of this CFTC brief (App.83a) after citing to *Lopez* also separately refers to Shasta as a "pool" or to Shasta's members as "pool participants" five times.

the Panel Opinion ignores numerous real world "facts" about commodity pools and their operators—the most obvious and glaring being that commodity pools "trade" commodity futures contracts. Commodity pools are specialized investment entities specifically created to engage directly in commodity futures trading in the name of the pool entity for and on behalf of the pool's members. And that fact has been well known to the CFTC from the day this civil action was first filed against the Petitioners (appropriately enough) on April Fool's Day of 2004. (See CFTC regulations found at App. 64a-81a)

Trading *in the name of* the pool is always, *without exception* conducted either by the pool operator or by some other individual or entity granted that authority *by the operator* under a very specific written power of attorney. For that simple reason the CFTC, the District Court and the Third Circuit Panel were never able to cite a single federal district court or appellate opinion that held a "commodity pool" to exist in the absence of trading by someone *in the name of* the alleged pool entity. The Panel Opinion's conflict with the common sense approach of the Ninth Circuit places the Third Circuit Court *in conflict with all other commodity pool related federal case law and in conflict with the inherent reality of what all commodity pools do!*

Consequently a form of the following relevant question first posed by Shimer in his summary judgment brief filed on April 7, 2006 and later posed again in petitioners' joint appellate brief remains unanswered by the CFTC, the District Court and the Third Circuit Panel:

> "If members of the general public who need not register with the CFTC must open a commodity futures trading account at a FCM *in their name* to become "involved" in the futures markets[8] how is it that entities can be alleged by the CFTC to be "commodity pools" ("operated" by entities alleged to be commodity pool "operators" subject to *extensive* trading related CFTC regulation) [9] without any evidence that the "commodity pool" entity allegedly "operated" *ever* engaged in that most basic activity for involvement in the futures markets required of the general public?"

The Third Circuit Panel was unwilling to address or answer that question because it was apparently unwilling to acknowledge and apply an approach to the issue raised by Petitioners' appeal required by simple common sense necessity in the Ninth Circuit. As a result, the federal judiciary is now presented with an unnecessary conflict in the circuits, with a Third Circuit Opinion in unnecessary conflict with what happens in the "real world" and in unnecessary conflict with all other federal courts that have ever addressed the commodity pool issue. It is difficult to imagine all of this conflict *ever arising* if Petitioners had not been forced by their financial reality to represent themselves *pro se* first before the District Court and then before the Appellate Court .

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[8] The record below contains certified documentation from the Federal Records Center in Chicago of CFTC expert witness testimony in the *Heritage* case confirming that simple, basic and uncontroverted "fact". (See App. 95a).

[9] See App. 64a-81a.

C. The Third Circuit Panel Opinion conflicts with the *actual test* adopted by the Ninth Circuit for determining if a "commodity pool" exists under any particular set of facts.

The Panel Opinion gives lip service to the four "tests" of *Lopez* on pages 20 and 21 (see App. 20a-21a) but studiously avoids any serious discussion or analysis of the meaning of the specific language chosen by the Ninth Circuit in fashioning all four tests from prior federal case law. The Panel justified its willingness to avoid any substantive application of all four *Lopez* tests to the entity Shasta by "distinguishing" the facts of the "Dean Witter investment vehicle" from the facts of Shasta. (App. 18a-19a)

As pointed out in the petition for rehearing *every case* obviously presents a set of facts different *in some way* from those of prior cases. If the approach of the Panel were generally adopted by all other courts, the tradition of rule of law (i.e. following clear and well decided previous legal precedent) is easily discarded whenever it is not conducive to a certain "judicially preferred" outcome. The *Lopez* Opinion did not intimate, imply or suggest *in any way* that the four "commodity pool" tests it devised as a result of its review of prior federal "commodity pool" case law were applicable *only* to the particular facts before that Court.

The closest thing the Panel ever comes to offering any sort of workable "test" of its own for determining if a commodity pool exists under any particular set of facts is to describe commodity pools

as "...the commodity-futures equivalent of a mutual fund". (App. 13a) and cites several authorities for that proposition. Such a superficial "non approach" to the summary judgment issue raised by Petitioners Shimer and Firth is the practical equivalent of saying to all district courts in the Third Circuit: there is no practical "test" in this circuit for determining if a particular entity qualifies as a "commodity pool".

The Panel's "mutual fund" discussion offers no credible analysis helpful to the summary judgment issue raised before the District Court. Describing a "commodity pool" as similar in nature to a "mutual fund" is to revert to the level of generalized abstraction the *Lopez* Court found of little use[10] in resolving its threshold issue: what is a commodity pool? The Petitioners suggest *that was (and unfortunately still remains) the undecided threshold potentially dispositive issue with respect to Petitioner Shimer and Firth's motions for summary judgment with respect to all counts of the Amended Complaint.*

A review of the "authorities" cited by the Panel in support of its eagerness to recognize that a commodity pool is "similar" to a mutual fund reveals that none of the information they contain about commodity pools contradicts or undermines *in any way* the specific language of the four tests devised by the Ninth Circuit Court. The Third Circuit's pseudo "test" (or "mutual fund analogy") for determining the existence of a commodity pool stands in stark contrast and obvious conflict with the clarity and

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[10] See *Lopez v. Dean Witter Reynolds, Inc.* supra, at 883.

certainty of the four tests offered by the Ninth Circuit in *Lopez*.

D. The Panel Opinion is also in conflict with the Second Circuit's understanding of the statutory scheme of the CEA and the importance of being "actively involved in commodities trading" in order to trigger a registration requirement under that act.

Shimer devoted almost *eight pages* in his second summary judgment brief filed on April 7, 2006 to a well researched analysis of the legislative history of the CEA and the clear expectation on the part of Congress that entities required to register as CPOs would ordinarily be actively involved *in the actual trading* of commodity futures contracts. (App. 84a-93a) That legislative history analysis was made available to the Panel on pages 335-342 of the Appendix filed with Petitioners' appeal brief. *No such analysis of the legislative history of those portions of the CEA that pertain to CPOs was ever conducted by the Panel.*

The clear expectation of Congress regarding the involvement of CPOs in the actual trading of commodity futures is reflected in the Second Circuit Opinion of *CFTC v. British American Commodity Options Corp.* 560 F. 2d 135, 138 (2d Cir. 1977) where that appellate court clearly and correctly observed:

> "In the 1974 Amendments to the Act, 7 U.S.C. § 1 et seq., Congress established the

> Commodity Futures Trading Commission and set up a comprehensive scheme for regulation of trading in commodity futures. Central to this statutory scheme is the requirement that persons *actively involved in commodities trading* shall be registered with the Commission." (Emphasis added).

The periodic transfer of Shasta's funds from an attorney escrow account at Citibank for the purpose of making an ongoing investment with the separate unaffiliated trading entity Tech *is not* an activity that qualifies either Shasta or its manager Equity as being "actively involved in commodities trading." The act of merely investing in another unaffiliated entity such as Tech (that engages in trading from its own accounts) does not bring Shasta's manager Equity within the clear intent of Congress as that intent was accurately stated above by the Second Circuit.

The above stated understanding of the Second Circuit Court of Appeals with respect to the statutory scheme of the CEA stands in direct conflict with the Panel's conclusion about the CPO status of Petitioner Equity. That is especially so *in the absence of any evidence in the record* that either Equity or Shasta actively engaged in any commodity futures trading. No such expectation by *any* of Shasta's members is found in the record below.

II. CERTIORARI IS APPROPRIATE AND NOW NECESSARY TO RESTORE CLARITY TO THE DETERMINATION OF WHAT ENTITIES MUST REGISTER AS COMMODITY POOL OPERATORS.

The Panel's "interpretation" of the statutory definition of CPO achieved its apparent "desired result" with respect to Equity and the other Petitioners but at the cost of creating far more than just a fourfold unnecessary conflict in the circuits. The Panel's peculiar interpretation of 7 U.S.C. § 1a(5) created unnecessary ambiguity and uncertainty for all district courts in the Third Circuit.

That unnecessary ambiguity and uncertainty arises from the obvious fact that different words have different meanings. The verb "invest" clearly has a different meaning than the verb "trade". The Panel held Shasta's manager Equity to be a CPO even though no actual trading by either Equity or Shasta ever occurred. The only activity of the entity managed by Equity was to place funds for periodic *investment* through its attorney with the trading entity Tech.

When are District Courts in the Third Circuit now supposed to conclude that a non-trading entity's manager is, nevertheless, a CPO under the Panel's "preferred" interpretation of the statute? What about entity "A" that *invests* in entity "B" that, in turn, *invests* in entity "C" that finally *does* "trade"? What if that "investment sequence" is carried *even further* to entity "D" and no actual trading occurs until funds reach entity "E"? Is entity A's manager also a "CPO"? If not, why not? What about the manager of entities "B" or "C"? How far down that chain of separate investing entities *that engage in no commodity futures trading whatsoever* must district courts in the Third Circuit now go before their appellate court is willing to concede that the act of "investing" is not

really the same as "trading" and that the manager of the investing entity in question is *not* a CPO?

The legacy of the Panel Opinion is inevitable confusion in the Third Circuit, direct conflict with the Ninth and arguable conflict with the Second Circuit as well--all the result of the Panel's inexplicable willingness to ignore a reality inadvertently confirmed in the CFTC's appellate brief: all commodity *pools* engage in the *trading of commodity futures contracts*. The second sentence of the first full paragraph on page 24 of the CFTC's appellate brief states:

> "The purpose of the pool must be to trade futures but the statutory definition of CPO does not require that the CPO itself handle *the pool's trading*."[11] (Emphasis added)

The Panel was also apparently willing to "overlook" *a second* CFTC appellate brief *faux pas*. On page 35 of that brief the CFTC confirmed that before the regulatory definition of "pool" was *narrowed* by the CFTC in 1981 [12] it specifically required *trading by the pool*:

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[11] Petitioners agree. Shimer and Firth's Motions were based upon the lack of a trading account in the name of the alleged pool entity Shasta–not a lack of trading by its alleged "operator" Equity.

[12] See Comm. Fut. L. Rep. (CCH) ¶21,188 at p. 24,891 (noted specifically by *Lopez*, supra at 884) where the CFTC's proposed revisions on August 4, 1980 to Part 4 Rules (45 FR § 1600) stated: "As proposed and as adopted, § 4.10(d) narrows the definition of the term "pool" by specifying that it is an entity 'operated for the purpose' of trading commodity interests."

> "Before 1981, the definition of "pool" covered "any investment trust, syndicate or similar form of enterprise *that trades* commodity interests." 44 Fed. Reg. 1918, 1924 (January 8, 1979) (emphasis added)."

It is not logical or reasonable to conclude that the *narrowing* of a previous regulatory definition that *required* trading by a "pool" would eliminate the requirement of trading in the current definition found at 17 C.F.R. § 4.10(d)(1) (see App. 63a). That is especially so in light of the very specific four part test of the *Lopez* Court that paid no attention *whatsoever* to that regulatory definition when it formulated its four part test.

The term commodity pool operator is a specific type of entity subject to very specific registration provisions enforced by a major federal regulatory agency. It is extremely important that clarity be restored to the question: what is a "commodity pool" when future district courts in the Third (and district courts in all other circuits but the Ninth) are asked to determine whether or not a specific entity is required to register under the CEA as a commodity pool "operator". The term commodity pool operator should not be allowed to remain under the cloud of extraordinary definitional confusion recently created by the Panel's untenable interpretation of 7 U.S.C. § 1a(5).

III. CERTIORARI IS APPROPRIATE WHEN A FEDERAL APPELLATE OPINION RESULTS IN AN EXPANSION OF FEDERAL AGENCY ENFORCEMENT AUTHORITY NOT AUTHORIZED BY CONGRESS.

It is well settled that federal agencies only have such authority as has been conferred by their enabling statute. In *Manhattan General Equipment v. Commissioner of Internal Revenue* 297 U.S. 129, 134 (1936) this Court stated what continues to be a well settled principle:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, *for no such power can be delegated by Congress*... . A regulation which...operates to create a rule out of harmony with the statute, *is a mere nullity. Lynch v. Tilden Produce Co.*, 265 U.S. 315, 320—322, 44 S.Ct. 488, 68 L.Ed. 1034; *Miller v. United States*, 294 U.S. 435, 439, 440, 55 S.Ct. 440, 79 L.Ed. 977, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but *it must be reasonable.*" (Emphasis added)

Federal agencies such as the CFTC clearly "...may not extend a statute or modify its provisions." *Campbell v. Galeno Chemical Co.* 281 U.S. 599, 610 (1930). An unauthorized extension or modification of the CFTC's regulatory authority is no less a nullity when effected by a federal appellate decision that is

both unreasonable and inconsistent with the plain language of the CFTC's enabling statute. If Congress cannot "...delegate to the Courts or to any other tribunals, powers which are strictly and exclusively legislative..." *Wayman v. Southard* 23 U.S. 1, 42 (1825) cited with approval in *United States v. Grimaud* 220 U.S. 506, 517 (1911) clearly the Third Circuit Panel was without power or authority to exercise a legislative prerogative Congress is without power to confer.

Judicial decisions similar to the Panel Opinion that seek a particular preferred outcome at the expense of logic and commonsense and that also abandon or ignore clear, unequivocal prior case law precedent often invoke the law of unintended consequences. By effectively affirming the District Court's unwillingness to grant the summary judgment motions of Shimer and Firth the Third Circuit Panel Opinion sanctions an extension of CFTC authority to technically require CPO registration by any and all entities that may be similarly situated to Equity that manage entities that may *invest* in other entities that trade *but engage in absolutely no commodity futures trading whatsoever on their own.* Suddenly every entity that is merely *a member* of a commodity pool is now arguably required to either seek from the CFTC an exemption from registration or, in the absence of the grant of such an exemption, register as a commodity pool "operator" with the CFTC under the Third Circuit's interpretation of the statute. Those who fail to do so face the theoretical *possibility* of civil enforcement by that agency for non-registration!

Certiorari in the present matter is appropriate and should be granted because the failure of both the District Court and Appellate Court *to collectively engage in any responsible analysis of existing CFTC commodity pool operator related regulations* (App. 64a-81a) (when coupled with an unreasonable appellate court interpretation of the CFTC's enabling statute issued without the benefit of any responsible legislative history analysis) resulted in an extension of enforcement authority to the CFTC neither anticipated nor granted by Congress. The unreasonable interpretation given by the Third Circuit to the language of 7 U.S.C. § 1a(5) effected what the CFTC had no authority to accomplish on its own: an impermissible amendment of its enabling statute.

This Court granted certiorari when a federal agency exercised its regulatory authority and created a definition of adulterated butter in conflict with the definition found in the statute. See *Lynch v. Tilden Produce Co.*, supra. If it was appropriate to grant certiorari in *Lynch* to resolve both a conflict in the circuits and a conflict between the regulatory and statutory definition of the term "adulterated butter", how much more appropriate is it to grant certiorari when the conflict now created between both the Ninth and Second Circuits and the Third Circuit's interpretation of the statutory definition of CPO found at 7 U.S.C. § 1a(5) *purports to authorize the CFTC to enforce in the future the provisions of its enabling statute against apparently any non-trading investing entity that may be even farther removed than Petitioner Equity from the actual trading of commodity futures contracts!*

Whether both the integrity of the commodity futures markets (and *actual traders* of those markets) would be further protected by regulating entities such as Equity that manage entities that *do not* trade commodity futures is well within the ability of Congress to determine after an opportunity for the inevitable debate and public feedback that accompanies the legislative process.

IV. THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS APPROPRIATE BECAUSE THE THIRD CIRCUIT PANEL DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED A SIMILAR DEPARTURE BY THE NEW JERSEY DISTRICT COURT.

Opinions of the district courts should always make sense and be a rational reflection or interpretation of existing federal statutes and prior case law. A district court decision issued without a sound basis in law erodes the public's confidence in the judicial process.

The District Court's stated reasons for denying Petitioner Shimer and Firth's two Motions were so lacking in sound reasoning and any basis in law the Third Circuit Court *never once* referred to any of those reasons in its July 13, 2009 Panel Opinion. (App. 3a-29a). A review of that Panel Opinion also reveals *not a single acknowledgement* that Shimer and Firth's *pro se* summary judgments motions ever existed!

That utter failure of the appellate court was never justified by any reference to *the general rule* that it is inappropriate for a circuit court of appeals to review a denial of summary judgment after an intervening trial on the merits. The application of that general rule by the various circuits is *almost always* justified by the existence in the record of sufficient factual ambiguity to present "genuine issues of material fact" more properly sorted out by the trier of fact at trial. See, for example, *Watson v. Amedco Steel, Incorporated* 29 F.3d 274, 277-78 (7th Cir. 1994) and cited cases noting at 278 that "...the denial of summary judgment typically becomes moot once the parties proceed to trial."

The proper application by the Panel of the four *Lopez* tests to the entity Shasta as a part of its review of the correctness of the District Court's denial of Shimer and Firth's summary judgment motions would *not* have resulted in redundant and unnecessary appellate review of issues of genuine material fact properly resolved at trial. The various factual issues purportedly "resolved" at trial *were all "immaterial" per Celotex Corp. if Shimer and Firth's pre-trial Motions were improperly denied!*

Both District Court Opinions (App. 32a-41a & App. 44a-52a) clearly recognize the importance of properly determining the "commodity pool" status of the entity Shasta for the summary judgment motions of Shimer and Firth and give lip service to *Lopez* yet reflect a petulant unwillingness to first engage in a rational analysis of the specific language contained in the four tests of *Lopez* and then apply that specific

language to the circumstances of the alleged pool entity Shasta.

Summary Judgment under Federal Rule 56(c) is *not* a discretionary remedy. In *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986) this Court stated that the standard to be applied "...mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)..." If the record reveals, as it does in the present case, an essential material fact missing from the non-moving party's case, all other facts alleged by the non-moving party Plaintiff are immaterial. Summary judgment *must* be granted *as a matter of law* per *Celotex Corp.*

The Panel refused to recognize the non-discretionary obligation of the District Court under Federal Rule 56(c). Such a refusal (given the unique circumstances of the present matter) is arguably a clear departure from the accepted and usual course of proceedings mandated by that Federal Rule. Summary judgment for Shimer and Firth in October of 2005 and again in November of 2006 was appropriate and should have been granted *as a matter of law* because the record was devoid of any evidence of a trading account and trading activity by the alleged pool entity Shasta-- a fact essential and material to the success *of every count* of the CFTC's Amended Complaint.

The *only connection* between all of the Petitioners and the CFTC's enforcement authority under the CEA is Equity's alleged status as a CPO. If Shasta is not a commodity pool, it is factually, logically and legally impossible for petitioner Equity

to be the "operator" of a commodity pool and *all connection* between the CEA and all of the Petitioners is severed. The unique circumstances of this case present an ideal opportunity for this Court to exercise its supervisory authority and remind the Third Circuit Court of the non discretionary nature of Rule 56(c). The non discretionary nature of that Federal Rule does not exist *only* for the benefit of those represented by outside legal counsel.

V. THIS COURT HAS A LONG TRADITION OF GRANTING CERTIORARI TO PROTECT THE CONSTITUTIONAL RIGHTS TO BOTH DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

A. The District Court's response to the *pro se* legal arguments of Shimer and Firth offered in support of two separate motions for summary judgment violated both their constitutional due process right to be heard and right to equal protection under the law.

Few would argue openly that *pro se* civil defendants have no right to be fully and fairly heard in the federal courts. Yet that has been the undeniable and consistent experience of the Petitioners for the past four years.

The fundamental "right to be heard" (so basic to the concept of due process itself) is the opportunity to be heard "...at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See also *United States v. Torres*, 383

F.3d 92, 103 & 104 (3d Cir. 2004) endorsing this basic principle by citing to *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

While it is true that concerns about due process arise more often in the context of deliberations that concern alleged criminal behavior, clearly the principle also applies in the civil context as well. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) *(Frankfurter, J., concurring).*

The District Court ignored and never acknowledged, mentioned or discussed *a single specific legal or fact based argument offered by Shimer in approximately 160 pages of pre-trial briefs filed in support of two separate proper motions for summary judgment extending over a period of more than two years.* Each specific *Lopez* argument and all other arguments offered by Shimer were repeatedly ignored and never mentioned. Shimer was twice "advised" that he was interpreting the otherwise clear and unequivocal language of the *Lopez* Court's fourth test "too literally". (See App. 41a and App. 52a).

If a district court can ignore and refuse to discuss in any meaningful manner a clear, well written and unambiguous prior appellate decision in another circuit by merely suggesting, in effect, that the appellate court "did not really mean what it said" such an approach does far more than place the entire

federal judiciary on a very slippery slope in which all predictability in the law is easily undermined. The repeatedly dismissive "attitude" of the District Court was a violation of Shimer and Firth's due process constitutional right to be reasonably heard.

Furthermore, in light of their obvious and continuing *pro se* status such an unnecessarily dismissive attitude should raise an equal protection concern as well. A *pro se* civil defendant's legitimate motion and argument under Rule 56(b) for summary judgment *must* be treated by the federal courts with the same respect, attention and consideration as any similar argument made on behalf of a civil defendant represented by retained legal counsel if that treatment is to survive constitutional scrutiny.

Petitioners are not proposing that the principle of equal protection and their right to due process necessarily obligates a district court to specifically address each and every argument of a *pro se* party if the court finds that party's analysis to be irrational, unsupported by the facts or deficient in some other way. Nor is due process violated if an alternative analysis contrary to the position of the *pro se* party is capable of withstanding *at least a modicum of rational scrutiny.*

But due process is not automatically satisfied merely because a district court judge exerts the effort necessary to apply pen to paper. The mere fact that a written opinion has been issued should not end an inquiry into whether a particular *pro se* defendant has been sufficiently "heard" to survive due process scrutiny.

If the District Court had provided Petitioners Shimer and Firth with anything *even approaching* a reasonable and rational analysis of why the four *Lopez* tests were in error or were not an accurate reflection of all prior "commodity pool" federal case law the due process right of Petitioners' "to be heard" would not have been violated. It is the lack of *any such analysis* coupled with the unwillingness of the District Court to fairly address the many reasonable *Lopez* related arguments offered by Shimer and Firth that justifies the necessary grant of this petition to defend the proposition that every *pro se* defendant has a clear and sacred constitutional right to be heard and to be heard in as respectful a manner as any civil defendant able to afford outside legal counsel.

B. Given the unique threshold and potentially dispositive CEA issues of the present matter the failure of the Third Circuit Panel to engage in *any appellate review* of the correctness of the twice denial by the District Court of Shimer and Firth's separate *pro se* motions for summary judgment violated both their constitutional right to due process and equal protection under the law.

When questions are presented to this Court about the due process sufficiency of appellate review afforded in state courts this Court has noted that "...the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of

their denial." *Honda Motor Co., Ltd. v. Oberg,* 512 U.S. 415, 430 (1994).

Honda Motor Co., Ltd. concluded at that same page 430 that

> "(w)hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *In re Winship*, 397 U.S., at 361, 90 S.Ct., at 1071."

The "absent procedure" in the present matter is the total lack of *any appellate review* of the correctness of the twice denial by the District Court of Shimer and Firth's separate *pro se* motions for summary judgment. Given the unique dispositive nature of the threshold summary judgment issue in the present case, that lack of appellate review by the Panel cannot be justified merely by the general rule (never cited by the Panel) that an intervening trial on remaining factual issues relieved the Panel of what should have been, *at least in the present case*, a *de novo* appellate responsibility to Petitioners.

As former Chief Justice Burger stated: "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the present

matter the "procedural protection" denied Petitioners was appellate review of the repeatedly and extensively argued threshold issue that was the primary subject and focus of their appeal--the correctness of the District Court's denial of Shimer and Firth's motions for summary judgment *dispositive of all counts* of the CFTC's Amended Complaint.

It is not necessary to spend any time in this petition speculating *why* the appellate court chose to completely ignore that *de novo* responsibility to the summary judgment motions of Shimer and Firth. It is enough that it did and sought refuge for that decision in an untenable interpretation of the statutory definition of CPO. Such behavior by the Panel was both arbitrary and unreasonable.

Any civil defendant subjected to arbitrary and unreasonable behavior by a federal judge or by a panel of federal circuit judges has been effectively denied that "process" which is every federal civil defendant's due. The combined behavior of both the District Court and the Panel in the present case highlights the importance of ensuring that the constitutionally required protection of due process is extended equally to *pro se* civil defendants.

A failure to grant this petition for certiorari would effectively deny the Petitioners Shimer and Firth for all time *any and all appellate review* of the merits of their claim to summary judgment with respect to all counts of the Amended Complaint under controlling summary judgment case law. That would be an egregious affront to the concepts of "rule

of law" "equal protection" and "due process" in light of the fact that before trial Shimer and Firth sought appellate review on February 9, 2007 of the District Court's twice denial of their Motions only to be effectively told that appellate review must wait *until after* a trial on the remaining issues. (App. 59a-60a)

Shimer and Firth's threshold summary judgment issue first "postponed" by a Third Circuit Panel on July 6, 2007 (App. 59a-60a) *was completely ignored* by a different Panel of that same Court two years later on July 13, 2009! Shimer and Firth's *pro se* status and the disdain shown again and again by both the District Court and the Appellate Court for otherwise legitimate legal arguments arguably raises equal protection concerns as well.

CONCLUSION

The petition for a writ of certiorari should be granted for all of the reasons stated above.

Respectfully submitted,

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November 27, 2009

IN THE

Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
Petitioners,

COMMODITY FUTURES TRADING COMMISSION
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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APPENDIX VOLUME I

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Date: November 27, 2009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. **08-1558, 08-1838, & 08-2495**

Commodity Futures Trading Commission
v.
Equity Financial Group LLC

ORDER

The appeals at Nos. 08-1558, 08-1838, and 08-2495 are hereby consolidated for purposes of scheduling and disposition. It is noted that Nos. 08-1558 and 08-1838 were consolidated for all purposes by Clerk's Order entered May 1, 2008. As the Court strongly disfavors repetitive briefs, Appellants are encouraged to file a consolidated brief or to join in or adopt portions of one another's briefs pursuant to Fed. R. App. P. 28(i). Appellees may file a consolidated brief, if they so choose.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: 5 June 2008

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-1558, 08-1838 & 08-2495

COMMODITY FUTURES TRADING COMMISSION
v.
EQUITY FINANCIAL GROUP LLC;
TECH TRADERS, INC.;
VINCENT J. FIRTH; ROBERT W. SHIMER;
J. VERNON ABERNETHY; COYT E. MURRAY;
MAGNUM CAPITAL INVESTMENTS, LTD.;
MAGNUM INVESTMENT, LTD;
TECH TRADERS, LTD.

Robert W. Shimer,
Appellant at No. 08-1558

Vincent J. Firth,
Appellant at No. 08-1838

Equity Financial Group, LLC,
Appellant at No. 08-2495

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 1-04-cv-01512
(Honorable Robert B. Kugler)

Argued March 3, 2009

Before: SCIRICA, *Chief Judge*,
SLOVITER and HARDIMAN, *Circuit Judges*.

(Filed: July 13, 2009)

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OPINION OF THE COURT

SCIRICA, *Chief Judge.*

This case involves a civil enforcement action under the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, and related regulations. Defendants were charged with fraud under 7 U.S.C. §§ 6b and 6o and failing to register with the Commodity Futures Trading Commission, as required by 7 U.S.C. §§ 6m and 6k, among other counts. In a bench trial, the District Court concluded Equity Financial Group was regulated as a commodity pool operator, and it found defendants liable for fraudulent conduct, failing to register, and other violations. The principal issue on appeal is whether Equity Financial is a commodity pool operator under 7 U.S.C. § 1a(5), even though it operated a feeder fund—a fund that did not itself execute commodity futures transactions but invested in another fund for that purpose. We will affirm.

I.

Defendants are Equity Financial; Vincent Firth, Equity Financial's president and sole shareholder; and Robert Shimer, its lawyer. They created Shasta Capital Associates, an investment vehicle that raised funds from investors through the sale of member shares. Equity Financial and Shasta Capital were distinct legal entities, but Equity Financial was the manager of Shasta Capital, controlling the Shasta Capital funds. Defendants solicited more than $15 million into Shasta Capital to trade futures contracts. Equity Financial did not execute commodity futures transactions on behalf of Shasta Capital but it invested the Shasta Capital assets in another fund, Tech Traders,[1] which pooled

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[1]We use the name Tech Traders to refer to four entities that operated in concert: Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd. The distinctions between these companies are irrelevant to this appeal. All four were named in the Amended Complaint along with Coyt E. Murray, the president, chief executive officer, or registered agent of the Tech Traders companies, and J. Vernon Abernathy, a certified public accountant who was retained by Murray and Tech Traders.

These companies, Murray, and Abernathy have settled with the agency and are not parties to this appeal. In a consent order, Tech Traders and Murray admitted to fraud in violation of 7 U.S.C. §§ 6b and 6*o*, failure to register as a commodity pool operator and commodity trading advisor in violation of 7 U.S.C. § 6m, and violating 17 C.F.R. § 4.30, applicable to commodity trading advisors, for trading client funds in its own accounts, among other violations. Tech Traders and Murray were enjoined from engaging in commodity trading and were ordered to pay nearly $18 million in restitution, more than $1.2 million in disgorgement, and more than $11 million in civil monetary

the Shasta Capital investment with other funds' investments, and executed transactions on behalf of the pool of funds. In this arrangement, Shasta Capital was a "feeder fund," and Tech Traders a "master pool" or "super fund."

Tech Traders and Coyt Murray, its president and chief executive officer, defrauded investors by misappropriating funds and falsely reporting Tech Traders's performance. [2] Defendants, Equity Financial, Firth, and Shimer, participated in the fraudulent conduct. They solicited and retained Shasta Capital investors by misrepresenting their qualifications and the performance of Shasta Capital's investments, and they took a portion of the invested funds for personal use through an arrangement with Murray that was not disclosed to investors.

Defendants made several false statements to investors, primarily in monthly and quarterly reports to investors and in Internet postings. They

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penalties. Under a separate consent order, Abernathy was found to have engaged in fraud in violation of 7 U.S.C. § 6*o*. He was enjoined from engaging in commodity futures markets, including accounting practices involving commodity futures. He was ordered to pay restitution, jointly and severally with other defendants, up to $5 million, and he was ordered to pay a civil monetary penalty of $300,000.

[2] As part of their settlement with the agency, Tech Traders and Murray admitted to violating 7 U.S.C. §§ 6b and 6*o* by fraudulently misrepresenting the performance of the Tech Traders fund.

represented that Shasta Capital was earning profits every month between June 2001 and February 2004, including double-digit rates of return in twenty-three of those thirty-three months.[3] But during this period, the Shasta Capital fund, which had invested solely in Tech Traders, was sustaining losses. Defendants' reports were based on information received from Tech Traders about Tech Traders's performance, but Firth and Shimer knew at least some of the Tech Traders reports were false or probably false. [4] Additionally, Shimer created a verification procedure that concealed the falsity of Tech Traders's reports. At Shimer's insistence, Tech Traders hired an accountant, J. Vernon Abernathy, who calculated and forwarded Tech Traders's false rate-of-return numbers to another accountant, Elaine Teague, hired by Shasta Capital. Teague relied on Abernathy's numbers in her own reports to defendants and in communications with Shasta Capital investors. But

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[3] Defendants reported returns of more than 130 percent from March 2003 to February 2004, 92 percent for the year 2003, and 108 percent for 2002. In the two worst-performing months between June 2001 and February 2004, they reported gains of 4.11 percent and 9.02 percent.

[4] In June 2002, Firth and Shimer learned Tech Traders's September 2001 report was false. In that month, relying on Tech Traders's reports, Shasta Capital reported a gain, but it actually suffered a loss. Neither Firth nor Shimer took any steps to correct the false September 2001 statements. Firth learned on at least three occasions that the value of Tech Traders's funds was less than the amount, based on Shasta Capital's own records, that Shasta Capital had invested with Tech Traders. These reports were inconsistent with the gains Shasta Capital was reporting to its investors and potential investors.

Shimer played a more direct role in the creation of Tech Traders's false reports. He invented the method Abernathy used to calculate Tech Traders's returns—a method that did not employ standard accounting practices and was misleading—and he helped Abernathy prepare many of the reports. Shimer also knew Abernathy lacked access to the records needed to calculate a proper rate of return. Apparently Teague was not aware of Shimer's involvement in the creation of the reports, the use of a nonstandard accounting procedure, or Abernathy's lack of access to necessary records. Teague accordingly provided a front to investors and potential investors, to verify the false reports.

Moreover, Firth and Shimer benefitted from an undisclosed arrangement with Murray and Tech Traders. Murray and Shimer had been involved in a prior business venture in which two other persons absconded with funds Shimer raised. Murray agreed to help Shimer repay the earlier investors if Shimer would solicit funds for Tech Traders. Under this agreement, Tech Traders would divert a portion of its "profits" back to Shimer through a trust called Shadetree in Nevis, West Indies.[5] Neither Firth nor Shimer disclosed the Shadetree agreement to Shasta Capital investors in statements or in Shasta

[5] Under the agreement, Shadetree would receive 5 percent of Tech Traders's operating fees and half of the profits Tech Traders would take after paying other fees, costs, and a premium to investors. Firth knew Shimer owed money to the prior investors, and he knew of the agreement between Shimer and Murray.

Capital's detailed Private Placement Memoranda.[6] Tech Traders paid $1,314,930 under the Shadetree agreement into accounts controlled by Shimer. Some of this money went to pay the earlier investors, some to pay a mortgage for Firth, and some to pay a referral fee to a former associate of Shimer.

The District Court concluded that Equity Financial was a commodity pool operator under 7 U.S.C. § 1a(5), and Firth and Shimer were statutorily defined associated persons of Equity

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[6] The Private Placement Memoranda, drafted by Shimer and approved and distributed by Firth, disclosed basic information about investing with Shasta Capital. Each Shasta Capital investor received one of these Private Placement Memoranda, depending on when he or she invested. The first Memorandum was distributed to investors during the time period between June 30, 2001, and February 18, 2003; the second between February 18, 2003, and September 2, 2003; the third between September 2, 2003, and April 1, 2004.

Only the first Memorandum made any mention of the Shadetree trust. It noted the trust would receive 5 percent of Tech Trader's operating costs. It did not, however, disclose that half of Tech Trader's profits would also be diverted to Shadetree.

In addition to omitting information about the Shadetree agreement between Shimer and Murray, the Private Placement Memoranda contained other misrepresentations or omissions about Shimer's and Firth's qualifications, business history, and the due diligence they claimed they conducted. The first of the three Private Placement Memoranda also included false information about Tech Traders's rate of return. Shimer calculated this rate, which was purportedly based on the return from another entity's Investments with Murray. Murray, however, would not verify this rate of return, and Shimer's calculations were not based on information that would allow him to calculate a proper rate of return.

Financial under 7 U.S.C. § 6k. It found Equity Financial liable under 7 U.S.C. § 6m for failing to register with the CFTC as a commodity pool operator, and Firth and Shimer liable under 7 U.S.C. § 6k for failing to register themselves as associated persons. The court concluded all three defendants had committed fraud under 7 U.S.C. §§ 6b and 6*o*.[7] Equity Financial, it held, was liable under 7 U.S.C. § 2(a)(1)(B) for Firth and Shimer's violations, and Firth and Shimer liable under 7 U.S.C. § 13c(b), as controlling persons of Equity Financial, for Equity Financial's violations, including its failure to register. Finally, the District Court concluded, Shimer is liable under 7 U.S.C. § 13c(a) for aiding and abetting Tech Traders's violation of 17 C.F.R. § 4.30. The court enjoined defendants from participating in commodity markets, and it ordered restitution, disgorgement of profits, and civil penalties. Defendants appeal from the judgment.[8]

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[7] In 2008, Congress amended § 6b in ways immaterial to this appeal. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 13102, 122 Stat. 1651, 2194–95. For the sake of simplicity, we refer to the pre-2008 version of the statute.

[8] We review the District Court's findings of fact for clear error, and we exercise plenary review over its interpretation of the law and its legal conclusions. *Am. Soc'y for Testing & Materials v. Corrpro Cos.*, 478 F.3d 557, 566 (3d Cir. 2007). The District Court had jurisdiction under 7 U.S.C. § 13a–1, and we have jurisdiction under 28 U.S.C. § 1291.

II

The Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, regulates the conduct of participants in commodity futures markets. These markets allow producers and purchasers of agricultural commodities and other products to hedge against the risk of future price movements caused by weather factors. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 357–58 (1982). For example, a farmer may sell a commodity for future delivery to protect against a price decrease; a purchaser may want to buy a commodity for future delivery to protect against a price increase. *See id.* Because market prices for these futures contracts shift, the exchanges provide a profit opportunity for investors who buy and sell the contracts even though they do not intend to take delivery of the commodity. *Id.* at 357–59 & n.11. These investors trade in the belief the price will change favorably. *Id.* at 357. Enticed into the market by the profit opportunity, investors are "willing to assume the market risk that the hedging farmer or [agricultural commodity] processor wants to avoid." *Id.* at 358.

> . . . The speculators' participation in the market substantially enlarges the number of potential buyers and sellers of executory contracts and therefore makes it easier for farmers and processors to make firm commitments for future delivery at a fixed price. The liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place.

Id. The presence of investors in these markets tends to broaden the market, reduce price fluctuations, and spread risk. *Id.* At 358, 359 n.11. Without speculative investors, "the liquidity, so badly needed in futures markets, simply would not exist." *Id.* At 359 n.11 (*quoting* H.R. Rep. No. 93-975, at 138 (1974)). Although historically focused on agricultural commodities, participants in futures markets now exchange contracts for the future delivery of a range of assets. The CFTC has jurisdiction over certain futures contracts traded, for example, on designated contract markets. These include contracts for several listed agricultural commodities, 7 U.S.C. §§ 1a(4), 2(a)(1)(A); "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in," *id.* §§ 1a(4), 2(a)(1)(A); and contracts of sale for future delivery of "a group or index of securities," *id.* § 2(a)(1)(C).[9]

Commodity pools, "the commodity-futures equivalent of a mutual fund," [10] facilitate the

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[9] Tech Traders traded futures contracts for the S&P 500 and NASDAQ 100 stock indices. It claimed it had developed special algorithms to identify trends in the market price of the futures contracts for these indices.

[10] *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 965 (7th Cir. 1986) ("A commodity pool is the commodity-futures equivalent of a mutual fund; the investor buys shares in the pool and the operator of the pool invests the proceeds in commodity futures."); *see also* 13 Jerry W. Markham, Commodities §17A-1 (2008) ("In its features, the typical commodity pool bears a strong resemblance to mutual funds and similar investment companies that have operated for decades in the securities industry.").

participation of investors in the market. They are vehicles through which investors can aggregate their funds, allowing a commodity pool operator to invest them for a fee. 13 Jerry W. Markham, Commodities Regulation: Fraud, Manipulation & Other Claims § 17A:1, at 17A-1 to 17A-2 (2008). The aggregation of funds also allows the pool, and by extension its participants, to hold a diversified portfolio and ensures individual investors will not have to take delivery of commodities. *Id.* at 17A-2 (*quoting* 1 Philip McBride Johnson & Thomas Lee Hazen, Derivatives Regulation § 1.11, at 1-251 (2004)). Typically the pool is organized in the form of a business entity that limits the liability of individual investors. *Id.* The amount of funds invested in commodity pools has grown immensely, from $75 million in 1976 to $600 billion in assets in 2005. *Id.* at 17A-2 & n.4.

III

As noted, Shasta Capital was a feeder fund that did not execute trades in its own name but instead invested its assets in the super fund Tech Traders. For this reason, defendants contend Equity Financial, Shasta Capital's manager, is not a commodity pool operator under the statutory definition in 7 U.S.C. § 1a(5).[11] We consider whether

[11] The statute defines "commodity pool operator" in § 1a(5) but does not define the term "commodity pool." The term "pool" is defined by regulation as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 C.F.R. § 4.10(d)(1). This regulation is not the basis for the agency's action in this case, and accordingly is not at issue in this appeal. *See infra* note 13.

the Act requires the commodity pool operator to trade commodity futures contracts in its own name and whether Equity Financial is a commodity pool operator under the definition in § 1a(5).

A

A commodity pool operator is defined in 7 U.S.C. § 1a(5) as

> any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility . . . .

7 U.S.C. § 1a(5). A commodity pool operator must engage in a business of a particular form; it must solicit, accept, or receive funds, securities, or property; and the solicitation must have a particular purpose—trading commodity futures. The solicitation, acceptance, or receipt of funds must be "for the purpose of trading," but nothing in the statute imposes an actual trading requirement. The plain language of § 1a(5) requires only that the entity be engaged in a business of the proper

form, and it solicit, accept, or receive funds for the purpose of trading.[12]

The absence of a trading requirement is consistent with the purposes of the statutory scheme.[13] The Commodity Act is intended to deter

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[12] Highlighting the lack of an explicit trading requirement in § 1a(5), the statute defines other market participants' roles in ways more obviously associated with trading. Floor brokers and floor traders are defined as persons who purchase or sell commodities for future delivery. 7 U.S.C. § 1a(16), (17). Future commission merchants and introducing brokers are persons who solicit or accept orders for the purchase or sale of commodities for future delivery. *Id.* § 1a(20), (23); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 359 (1982) ("[F]utures commission merchants . . . solicit orders from individual traders, and . . . floor brokers . . . make the actual trades on the floor of the exchange on behalf of futures commission merchants and their customers."). Within the statutory classification, these roles differ from that of the commodity pool operator. The language in § 1a(5) neither requires a commodity pool operator to "purchase or sell" futures contracts, as floor brokers and traders do, nor does it require it to place orders, the conduct complementary to that of a futures commission merchant and introducing broker.

The definition of associated persons of commodity pool operators in 7 U.S.C. § 6k emphasizes that solicitation of funds, not trading, is the conduct in which the commodity pool operator must engage. That provision only requires registration of persons involved in the solicitation of funds or the supervision of those who solicit funds.

[13] We do not decide whether the agency's regulations defining and regulating pools deserve deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The agency has asserted that "it is unnecessary for the Court to apply a *Chevron* . . . analysis in this appeal." (Br. Of Appellee at 34 n.12.) We note, however, that the regulations

and prevent ...disruptions to market integrity" and "protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets." 7 U.S.C. § 5(b). The specific provisions governing commodity pool operators are directed toward regulating activities involving the solicitation of funds. "Commodity pool operator" was first defined in the 1974 Act, and testimony included in the House of Representatives Report accompanying that bill addressed the purposes of the new provisions:

> One of the ways in which unsophisticated traders have lost substantial amounts of money is through commodity advisors and commodity pool operators. This bill will provide for the registration of all such persons, establish procedures under which they will be

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appear to comport with the interpretation we give the statute. Unlike the statute, the regulations define a pool. The regulations do not include a trading requirement, defining a pool as "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 C.F.R. § 4.10(d)(1).

The regulations also cover pools that invest in other pools. The regulations define an "investee pool" as "any pool in which another pool or account participates or invests, *e.g.*, as a limited partner thereof." *Id.* § 4.10(d)(4). A commodity pool operator must disclose the performance of investee pools in which its pool invests. *Id.* § 4.25(c)(4), (c)(5). And the regulations cover those "investor fund commodity pool operators" that do no trading of their own but invest all funds in an investee fund. *See* 17 C.F.R. Part 4 app. A (providing guidance to a commodity pool operator that "allocates the fund's assets to one or more investee funds").

> permitted to operate and specifically eliminate certain undesirable practices which have enticed unsuspecting traders into the markets with, far too often, substantial loss of funds.

H.R. Rep. No. 93-975, at 79 (1974) (statement of Dr. Clayton Yeutter, Assistant Secretary of Agriculture). [14] Accordingly, when Congress defined commodity pool operator, it sought to regulate the solicitation of funds from customers and potential customers. And it intended to protect them from harmful conduct, especially fraudulent solicitation. The statute would be undermined if one entity could escape regulation merely by having another execute its trades.

Defendants contend we should follow *Lopez v. Dean Witter Reynolds, Inc.*, 805 F.2d 880 (9th Cir. 1986), which, they maintain, imposes a trading requirement. Specifically, *Lopez* describes a commodity pool as

> (1) an investment organization in which the funds of various investors are solicited and combined into a single

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[14]The 1936 Act, though not defining commodity pool operators, had similar aims. The Senate Report accompanying the 1936 Act suggested that Act would "more adequately" address "[c]ertain trade practices involving the cheating of customers." S. Rep. No. 74-1431, at 3 (1935). "Clearly Congress has recognized through the years that fraudulent and deceptive conduct in connection with futures transactions can and does occur prior to the actual opening of a trading account . . . ." *Hirk v. Agri-Res. Council, Inc.*, 561 F.2d 96, 104 (7th Cir. 1977) (construing the language of 7 U.S.C. § 6b in light of the legislative history accompanying the 1936 and 1974 Acts).

> account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the *entire* account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of an individual investor.

805 F.2d at 884. Under this definition, defendants contend a person must trade in commodity futures to be a commodity pool operator. *Lopez*, however, is distinguishable: Dean Witter traded the funds at issue from its own account. *Id.* at 882 n.2. The legal question was whether the Dean Witter investment vehicle was an entity of the proper form—"a business of the nature of an investment trust, syndicate, or similar form of enterprise"—despite the lack of pro-rata sharing of profits and losses. *Id.* at 883–84. The *Lopez* court confronted different facts and a different legal question. It did not address whether a commodity pool operator must itself execute commodity futures transactions.

In conclusion, the statute does not require a commodity pool operator to execute commodity futures transactions. The language of the definition lacks an explicit trading requirement, and the remedial purposes of the statute would be thwarted if the operator of a fund could avoid the regulatory scheme simply by investing in another pool rather

than trading. If an entity is engaged in a business in the nature of an investment trust, syndicate, or similar form of enterprise, and it solicits, accepts, or receives funds for the purpose of trading, it is a commodity pool operator. The actual trading of commodity futures is not required.

B

Under 7 U.S.C. § 1a(5), Equity Financial, as the manager of Shasta Capital, is a commodity pool operator. A commodity pool operator must be "engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise." 7 U.S.C. § 1a(5). A business takes this form when it provides a vehicle for a collective or group investment. *Lopez* aides our understanding of this provision. A business falls within this category when it combines investor funds into a single, commingled account; participants share pro rata in any profits and losses; and funds are invested or traded collectively, on behalf of the entire account, rather than in the name of individual investors. *See Lopez.*, 805 F.2d at 884; *supra* Part III.A. In *Lopez*, Dean Witter assigned each investor an individual account number, and not all investors' funds were used in each trade. 805 F.2d at 882 n.2. Because "not all accounts shared a pro rata profit or loss," the Dean Witter investment vehicle was not a commodity pool operator. *Id.* At 884. In this case, defendants collected all investor funds in Shimer's attorney escrow account, and Shimer transferred the commingled funds from his account to Tech Traders. Tech Traders held Shasta Capital's funds in Shasta

Capital's name, not in the names of Shasta Capital's investors. Under the Private Placement Memoranda, the Shasta Capital investors shared profits and losses on a pro-rata basis. Shasta Capital was accordingly a vehicle for collective, group investment. Because Equity Financial was the manager of Shasta Capital, it was engaged in a business "of the nature of an investment trust, syndicate, or similar form of enterprise."

A commodity pool operator also must "solicit[], accept[], or receive[] . . . funds . . . for the purpose of trading in any commodity for future delivery." 7 U.S.C. § 1a(5). Firth and Shimer, acting individually and through Equity Financial, solicited funds for Shasta Capital. Shimer drafted the Private Placement Memoranda, and Firth approved these documents and distributed them to potential customers. Equity Financial, Firth, and Shimer advertised the Shasta Capital fund on the Internet. As a result of these efforts, they received more than $15 million into Shasta Capital. According to the terms of a 2001 investment agreement with Tech Traders and the Private Placement Memoranda, the funds were to be invested with Tech Traders for the purpose of trading futures contracts.

Accordingly, the form of the Shasta Capital enterprise and Equity Financial's solicitation and receipt of funds for the purpose of trading futures contracts place Equity Financial squarely within the definition of a commodity pool operator.

IV

Defendants challenge the District Court's conclusion that they committed fraud under 7 U.S.C. §§ 6b and 6*o*.[15] Specifically, they contend the evidence does not

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[15] As a commodity pool operator, Equity Financial is regulated by § 6*o*, which also governs conduct by Firth and Shimer, who are statutorily defined associated persons of Equity Financial. *See* 7 U.S.C. § 6k (requiring registration of persons associated with a commodity pool operator as a "partner, officer, employee, consultant, or agent . . . in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person" so engaged). According to § 6*o*,

> (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator
> ...
> (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6*o*. The District Court concluded the defendants violated this antifraud provision as well as the antifraud provision in § 6b. Section 6b regulates "any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery made, or to be made, for or on behalf of any other person." 7 U.S.C. § 6b(a)(2) (2006). Defendants do not meaningfully challenge the applicability of § 6b to them. "[A]ppellants are required to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief." *Kost v.*

support a finding of scienter.[16] Scienter is an "intent to deceive, manipulate, or defraud," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976), and it may be shown either by conscious behavior or recklessness. *See Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988); *First Commodity Corp. of Boston v. CFTC*, 676 F.2d 1, 6–7 (1st Cir. 1982) (concluding a reckless misrepresentation suffices, "one that departs so far from the standards of ordinary care that it is very difficult to believe the

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Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993). Defendants failed to present a proper argument.

[16] There are different views about whether the antifraud provision in 7 U.S.C. § 6*o*(1)(A) includes a scienter requirement. *Compare First Nat'l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1341–42 (6th Cir. 1987) ("[Section 6*o*] does not contain the same scienter requirement as § [6b]. .. . [T]he complainant need prove only that the commodity trading advisor intentionally made the statements complained of, and not that the advisor acted with the intent to defraud."), *and CFTC v. Savage*, 611 F.2d 270, 285 (9th Cir. 1979) (concluding a violation of § 6*o*(1) only requires the intent to "employ the 'device, scheme, or artifice'"), *with Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 677–80 (11th Cir. 1988) ("[W]e conclude that Section 6*o*(1)(A) contains the same *scienter* requirement as Section 10(b) and Rule 10b–5 of the federal securities laws, while Section 6*o*(1)(B) does not require proof of *scienter*."). Because we conclude defendants' conduct in this case demonstrates scienter, we do not also decide whether some other culpability standard would also suffice.

speaker was not aware of what he was doing"); *cf. Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 267 & n.42 (3d Cir. 2009) (noting that under federal securities law, either reckless or conscious behavior suffices).[17]

Firth and Shimer both knew or recklessly disregarded an obvious risk that Abernathy's reports were false. Both Firth and Shimer learned in 2002 of at least one report, the September 2001 report, that was false. Additionally, Firth learned on at least three occasions that Tech Traders did not have as much money in its accounts as the Shasta Capital records reflected. Defendants nonetheless continued reporting Abernathy's performance results as Shasta Capital's own performance results. Shimer knew Abernathy did not have access to the records he would need to calculate a rate of return. He nonetheless created a system to communicate Abernathy's false reports to investors and potential investors in a way that would appear to be credible, verified by two certified public accountants. Furthermore, Shimer was a party to and Firth knew of the Shadetree agreement, which was not disclosed

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[17] "The language of [7 U.S.C. § 6b] is similar to that of § 10(b) of the Securities Exchange Act of 1934 . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 389 n.88 (1982). "A reckless statement is one involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 535 (3d Cir. 1999) (internal quotation marks omitted) (interpreting scienter in the context of federal securities law).

to investors, and which diverted funds into accounts controlled by Shimer. In light of their knowledge of the falsity of their statements and disclosures, these misrepresentations suffice to show Firth and Shimer acted with scienter.

V

Firth and Shimer challenge the District Court's conclusion that they are liable as controlling persons for Equity Financial's failure to register with the agency.[18] Any person "who, directly or indirectly, controls any person who has violated any provision of this chapter" is liable for the controlled person's violation if he "did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation." 7 U.S.C. § 13c(b). Here, defendants continued operating the Shasta Capital fund without registering, despite knowing Equity Financial was in violation of the registration requirement. In the fall of 2003, two potential Shasta

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[18] If commodity pool operators use the mails or any means or instrumentality of interstate commerce, they must register with the agency under 7 U.S.C. §§ 6m and 6n. Equity Financial violated this provision because it was a commodity pool operator engaged in interstate commerce and did not register.

In addition to concluding Firth and Shimer were secondarily liable as controlling persons for Equity Financial's failure to register, 7 U.S.C. § 13c(b), the District Court concluded Shimer was secondarily liable for the same violation under the aiding and abetting provision, 7 U.S.C. § 13c(a). It is not clear whether Shimer appeals this latter holding. But if so, his brief contains no argument to this matter, and accordingly he has waived it. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

Capital investors contacted Firth and Shimer, telling them the CFTC believed registration was necessary. In light of this information, Firth and Shimer hired a law firm in October 2003 to consider Equity Financial's registration requirements. Disagreeing with Shimer's own legal analysis, the law firm believed the failure to register subjected the operation to legal action by the CFTC.[19] The law firm repeated its opinion in a December 2003 letter, and encouraged Firth and Shimer to approach the CFTC, along with Tech Traders, to cure the defects. If Tech Traders would not also register, the law firm suggested defendants would have to end their relationship with Tech Traders. Defendants, despite knowing by this time that the CFTC was investigating Shasta Capital and that Shasta Capital was not in compliance with the registration requirement, wanted to continue the relationship with Tech Traders and Murray. "[S]o long as the numbers were still there," stated Shimer, nobody wanted to jeopardize the relationship. Despite learning about the registration requirement in October 2003, Firth and Shimer continued to solicit investments into the unregistered Shasta Capital fund, and took in more than $8.5 million between November 2003 and April 2004. Firth and Shimer knew about the registration requirement and continued to operate the fund without registering. The failure to register was not a result of a good faith belief that Equity Financial did not need to register

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[19] The law firm was not privy to information that would have revealed the fraudulent conduct.

but because "the numbers were still there," numbers that furthered the fraudulent scheme.

VI

The District Court concluded Shimer aided and abetted Tech Traders's violation of 17 C.F.R. § 4.30. Section 4.30 prohibits a commodity trading advisor from soliciting, accepting, or receiving client funds to purchase, margin, guarantee or secure commodity future interests of the client.[20] Shimer contends Tech Traders was not a commodity trading advisor because Shasta Capital neither traded commodity futures in its own name nor intended to do so. A commodity trading advisor is any person who (i) "for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability" of trading in any commodity for future delivery or (ii) "for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports" concerning such activities. 7 U.S.C. § 1a(6). This definition focuses on the conduct of the commodity trading advisor—Tech Traders in this case. Shasta Capital's choice to invest in the Tech Traders fund

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[20] In this relationship, Tech Traders was the commodity trading advisor and Shasta Capital was its client. Tech Traders violated 17 C.F.R. § 4.30 by receiving Shasta Capital funds and using them to trade commodity future interests. Had Tech Traders established a separate fund to serve as a commodity pool, it could have acted as both a commodity pool operator and a commodity trading advisor without violating § 4.30. Accepting and trading the funds itself rather than establishing a distinct entity ran afoul of the regulation.

rather than trade in its own name is irrelevant to Tech Traders's status under this definition.

Additionally, Shimer contends he is not liable because he did not have the requisite mental state under 7 U.S.C. § 13c(a), the aiding and abetting provision of the Act. Section 13c(a) establishes liability for a person who "willfully aids, abets, counsels, commands, induces, or procures the commission of" a violation of the rules, regulations, or orders promulgated under the Act; "acts in combination or concert with any other person in any such violation;" or "willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation." 7 U.S.C. § 13c(a). Shimer's actions meet the standard. He drafted a 2001 investment agreement between Tech Traders and Shasta Capital. Under the agreement, Tech Traders received Shasta Capital funds for the purpose of trading commodity future interests in Tech Trader's name. Shimer transferred Shasta Capital funds from his attorney escrow account to Tech Traders for that purpose, and he continued doing so after being advised by his law firm in October 2003 that Tech Traders could not trade Shasta Capital funds from Tech Traders's account. At least for the period after October 2003, Shimer's conduct suffices to establish his liability for aiding and abetting Tech Traders's violation.[21]

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[21] Shimer also challenges the District Court's determination by claiming Shasta Capital did not seek or obtain a commodity interest. The evidence, however, amply demonstrates Shimer's conduct furthered the relationship between Shasta Capital and

VII

For the foregoing reasons, we will affirm the judgment of the District Court.

Tech Traders in which Tech Traders received Shasta Capital funds to "purchase, margin, guarantee or secure" commodity interests. *See* 17 U.S.C. § 4.30.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-1558, 08-1838 & 08-2495

COMMODITY FUTURES TRADING COMMISSION
v.
EQUITY FINANCIAL GROUP LLC;
TECH TRADERS, INC.; VINCENT J. FIRTH
ROBERT W. SHIMER; J. VERNON ABERNETHY;
COYT E. MURRAY; MAGNUM CAPITAL
INVESTMENTS, LTD.; MAGNUM INVESTMENT,
LTD; TECH TRADERS, LTD.

Robert W. Shimer,
Appellant at No. 08-1558

Vincent J. Firth,
Appellant at No. 08-1838

Equity Financial Group, LLC,
Appellant at No. 08-2495

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 1-04-cv-01512
(Honorable Robert B. Kugler)

Argued March 3, 2009
Before: SCIRICA, *Chief Judge*, SLOVITER and
HARDIMAN, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 3, 2009. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 6, 2006, 2008, and the amended judgment of the District Court entered June 10, 2008, be, and the same are hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 13 July 2009

Costs Taxed in Favor of Commodity Futures Trading Commission as follows:

Total for Brief $418.32

Total $418.32

NOT FOR PUBLICATION (Docket Nos. 159, 160, 167, 189, 230, 231)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY CAMDEN VICINAGE

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v.

EQUITY FINANCIAL GROUP, LLC, et. al.,
Defendants.

KUGLER, United States District Judge:

Before the Court are motions by Defendants Robert W. Shimer, Vincent J. Firth, and Equity Financial Group, LLC, to dismiss the Counts against them in Plaintiff Commodity Futures Trading Commission's First Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b) (1) or for failure to state a claim under Rule 12(b) (6). Also before the Court is Defendants' motion for summary judgment. For the reasons provided below, Defendants' motions will be denied in their entirety.

I. Background

The motions presently before the Court relate to the role of Robert W. Shimer ("Shimer"), Vincent J. Firth ("Firth"), and Equity Financial Group, LLC ("Equity"), collectively "Equity Defendants"), in a multi-million dollar commodity fraud operated by Defendants Tech Traders and its president Coyt Murray. Between June 2001 and April 2004, Tech Traders allegedly solicited over $47 million in investments by claiming to employ a portfolio trading system that guaranteed significant annual returns. While Tech Traders and its supposedly independent certified public accountant (CPA), Defendant J. Vernon Abernethy, reported substantial monthly and quarterly gains, Tech Traders was actually hemorrhaging money at a remarkable rate, resulting in losses in excess of $20 million. Tech Traders lost at least $7 million in trading commodity futures contracts, and unlawfully appropriated investors' funds to pay salaries, expenses, and make disbursements under the guise of profit.

The Equity Defendants' liability arises from their control and operation of a related investment group, Shasta Capital Associates, LLC ("Shasta"), which was essentially a feeder fund for Tech Traders. The Commodity Futures Trading Commission ("CFTC" or "Plaintiff") alleges that the Equity Defendants solicited approximately $15 million from 74 investors between June 2001 and March 2004, for the purpose of investing in Tech Traders. Shasta's Private Placement Memorandum informed investors

that 99% of this money would be invested for the benefit of Shasta and 1% would be used for management costs. Upon receipt, investor funds were deposited into Shimer's attorney escrow account and then transmitted to Tech Traders. Tech Traders pooled the Shasta funds with its other investment funds and used them, in part, to trade exchange-traded commodity futures contracts and foreign currency contracts.

Over the course of their relationship with Tech Traders, the Equity Defendants reported tremendous trading profits, even though Shasta was actually losing substantial sums through Tech Traders and apparently failed to generate any profit whatsoever. The Equity Defendants further misled investors by representing that these profit numbers were verified by an independent CPA, Defendant Abernethy, whose results were then affirmed by a second CPA. The CFTC alleges that the Equity Defendants knew or should have known that neither CPA's review was independent and that the results were therefore unverified.

Shimer, representing himself pro se, filed a motion to dismiss for failure to state a claim, a motion to dismiss for lack of jurisdiction, and a motion for summary judgment on April 14, 2005. Firth joined Shimer's motions on April 15, 2005, and Equity joined on April 28, 2005.[1] The motion for

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[1] On May 13, 2005, Shimer sent, but did not electronically file, a letter to the Court requesting the Court extend his motion to dismiss to encompass Count V of Plaintiff's First Amended Complaint. Because Shimer failed to follow the proper

summary judgment was dismissed without prejudice, pursuant to a status conference with Magistrate Judge Ann Marie Donio. Shimer and Firth later refilled motions for summary judgment on July 8, 2005.

II. Discussion

A. Standard

Although the Equity Defendants have filed three separate motions, each motion uses essentially the same arguments to dispute the same point: whether Shasta is a "commodity pool" for the purposes of CFTC jurisdiction.[2] Because the parties' dispute is essentially one of law, founded on solely legal arguments, the standard this Court applies in resolving the dispute is of little import. Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where the question the court must address is solely a question of law, there is "no real distinction in this context between the question presented on a 12(b) (6) motion

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procedure for amending motions under Local Rule 7.1, and because this Court now finds that Shimer's motion to dismiss has no merit, this Court will not consider Shimer's letter.

[2] Defendants spend over 170 pages of briefing belaboring this point in what can only be characterized as an abuse of the judicial process. Shimer's initial brief is approximately 92 pages, well in excess of the 40 pages authorized by Local Rule 7.2(b). Pursuant to a letter filed February 11, 2005, Shimer requested that the Court make an exception to this rule and permit his brief to stand. This Court will permit Shimer's overlong motion to stand, however, further failures to comply with the Local Rules will not be permitted

and a motion for summary judgment.").[3] Accordingly, this Court will assess the merits of Defendants' argument through the lens of the summary judgment standard.

Summary judgment is only appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331. If the moving party has not fully discharged its initial burden, its motion for

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[3] Dismissal under Rule 12(b) (1) is appropriate only if the court lacks subject matter jurisdiction over the suit. A district court has jurisdiction where a well-pleaded complaint establishes that plaintiff's right to relief depends on resolution of a substantial question of federal law. See e.g. Franchise Tax Bd. Of State of Cal. V. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 10 (U.S. 1983). If the Plaintiff pleads a federal cause of action, the court should dismiss for lack of subject matter jurisdiction only where the claims are "so attenuated and unsubstantial as to be absolutely devoid of merit." Murrow v. Clifford, 502 F.2d 1066, 1068 (3d Cir. 1974). Because plaintiff CFTC's claims are neither frivolous nor devoid of merit, this Court has jurisdiction over the present suit. Accordingly, Defendants' motion to dismiss for lack of jurisdiction under 12 (b) (1) will be denied.

summary judgment must be denied. Id. at 332.

B. Commodity Pool

Congress amended the Commodity Exchange Act and established the CFTC in 1974 in an attempt to insure "fair practice and honest dealing on the commodity exchanges and provid(e) a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. Rep. No. 1131, 93d Congo 2d Sess., reprinted in [1974] u.s. Code Congo & Ad. News, 5843, 5844; Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 883 (9th Cir. 1986). Defendants now argue that their company, Shasta, does not fall under the definition of a commodity pool and is therefore exempt from the jurisdiction of the CFTC.[4]

For the purpose of the Commodity Exchange Act, "(p)ool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR § 4.10(d)(1). As amended by Congress in 1992, a "commodity pool operator" is defined as:

> any person engaged in a business that is of the nature an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or

[4] Plaintiff asserts that Defendants need not be a commodity pool for the purpose of Count I and Count V of the First Amended Complaint. Because this Court finds that Shasta is a commodity pool, it does not reach the merits of the CFTC's argument.

> property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market.

Pub L. No. 102-546, 106 Stat 3590 (1992).

A commodity pool is distinguished from other investment entities by the aggregation of investor funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among the investors. In Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986), the Ninth Circuit articulated four requirements to ascertain the presence of a commodity pool: "(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor." Id.; see also Nilsen v. Prudential-Bache Securities, 761 F. Supp. 279, 292 (S.D.N.Y. 1991) (citing Lopez, 805 F.2d at 884) ("Essentially, a commodity pool operator is one who manages an investment fund, similar to a mutual fund, in which the assets of several investors are invested together with gains or losses shared pro rata by the participants."); Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 ("In a

commodity pool, all investors' funds are placed in a single account. Transactions are then executed on behalf of the entire account and not allocated to any particular investor. The investors' profits and losses are then allocated by shares to individual investors based on their contribution to the fund.").

Courts have been adamant that where funds are not actually commingled, a commodity pool does not exist. Thus, the Lopez Court held that the enterprise at issue was not a commodity pool because "not all accounts traded the same contracts," and "[t]herefore, not all accounts shared a pro rata profit or loss." Id. at 884. Similarly, in Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶21,107, p. 24,462 (D.D.C.1980), a case relied upon in Lopez, the Court found that the fact that the funds were not pooled into a single account precluded the enterprise from being a commodity pool, since "the profitability of plaintiff's investment was actually dependent only upon [defendant's] success or failure in trading for plaintiff's account even if it was coincidental with the profitability of the accounts of other investors." Id. Although the defendant did not give each account individual consideration and often invested various investors' funds in similar enterprises, the funds were not actually pooled.

Unlike the defendant entities in Lopez and Meredith, Shasta actually pooled investor accounts. Shasta satisfies the four factors of the Lopez test: (1) the funds of individual investors were pooled in

Defendant Shimer's equity account; (2) these comingled funds were then transferred en masse to Tech Traders to be invested in commodity futures, without distinguishing between the funds of individual investors; (3) investors believed that gains from the Tech Traders operation would be allocated pro rata, depending on the relative amount of their investment; and (4) trades were made on behalf of the pool rather than in the name of individual investors. Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool.

The fact that Shasta did not invest in commodity futures directly, but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool. In fact, the Shasta transactions mirror those in Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶ 21,627, p. 26,384 (N.D. Ill.1982), another case formulating the basis for the Lopez decision. Heritage involved an operation very similar to Shasta: defendants solicited funds from individual customers, combined those funds into a common investment account [5] where the funds were commingled, and then gave those funds to a third party for investment in the futures market. In Heritage, the Court held that because investors expected to share profits and losses on a pro rata basis, the enterprise was a commodity pool,

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[5] Defendants in Heritage actually deposited funds into two different accounts, both of which contained the conmingled funds of a variety of customers.

regardless of the fact that it was a third party who conducted the actual investment activities. Id.

Defendants go to great lengths to argue that because the Shasta funds were not traded "in the name of Shasta" Shasta does not satisfy the fourth factor of the Lopez test and cannot be a commodity pool. Defendants' reading of the Lopez Court's language is far too literal. The Court intended the fourth factor to distinguish cases, such as Meredith, where investments are made in many of the same enterprises in the name of individual investors without pooling funds together in a single account. The appellation given the actual transaction is irrelevant, so long as it is a pooled fund and not conducted in the names of individual customer accounts. See In re Slusser, 1998 WL 537342 at n.36 (holding that entities at issue were commodity pools even though "[t]he pools were not traded in the name of the pool... [t]he key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here."). This pooling is clearly present here.

Besides arguing that Tech Traders did not invest Shasta's funds "in the name of Shasta," Defendants raise no evidence to suggest that Shasta is not a commodity pool. Accordingly, Defendants motions will be denied.

The accompanying order will issue today.

Dated: 10-4-05

/s/Robert B. Kugler
Robert B. Kugler
United States District Judge

(Docket Nos. 159, 160, 167, 189, 230, 231)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v. **ORDER**

EQUITY FINANCIAL
GROUP, LLC, et. al.,
Defendants.

This matter having come before the Court on Defendants' Robert W. Shimer, Vincent J. Firth, and Equity Financial Group, LLC ("Defendants"), Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b) (1) and 12(b) (6), Defendants' Motion for Summary Judgment, and Defendant Shimer's motion to allow a previously filed overlong brief to stand; and the Court having considered the moving papers, and the opposition thereto; and for the reasons expressed in the Opinion issued this date;

IT IS hereby **ORDERED** that Defendant Shimer's motion to allow a previously filed overlong brief to stand [189] is **GRANTED;**

IT IS further ORDERED that Defendants' remaining motions (159, 160,167, 230, 231) are DENIED.

Dated: 10-4-05

/s/ Robert B. Kugler
Robert B. Kulger
United States District Judge

NOT FOR PUBLICATION (Docket Nos. 334, 335)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v.

OPINION

EQUITY FINANCIAL
GROUP, LLC, et. al.,
Defendants.

KUGLER, United States District Judge:

Before the Court are motions by Defendants Robert W. Shimer and Vincent J. Firth for summary judgment with respect to all counts in Plaintiff Commodity Futures Trading Commission's First Amended Complaint, pursuant to Federal Rule of Civil Procedure 56(b). For the reasons provided below, Defendants' motions will be denied.

I. Background

The motions presently before the Court relate to the role of Robert W. Shimer ("Shimer"), Vincent J. Firth ("Firth"), and Equity Financial Group, LLC

("Equity"), (collectively "Equity Defendants"), in a multi-million dollar commodity fraud operated by Defendants Tech Traders and its president Coyt Murray. Between June 2001 and April 2004, Tech Traders allegedly solicited over $47 million in investments by claiming to employ a portfolio trading system that guaranteed significant annual returns. While Tech Traders and its supposedly independent certified public accountant ("CPA"), Defendant J. Vernon Abernethy, reported substantial monthly and quarterly gains, Tech Traders was actually hemorrhaging money at a remarkable rate, resulting in losses in excess of $20 million. Tech Traders lost at least $7 million in trading commodity futures contracts, and unlawfully appropriated investors' funds to pay salaries, expenses, and make disbursements under the guise of profit.

The Equity Defendants' liability arises from their control and operation of a related investment group, Shasta Capital Associates, LLC ("Shasta"), which was essentially a feeder fund for Tech Traders. The Commodity Futures Trading Commission ("CFTC" or "Plaintiff") alleges that the Equity Defendants solicited approximately $15 million from 74 investors between June 2001 and March 2004, for the purpose of investing in Tech Traders. Shasta's Private Placement Memorandum informed investors that 99% of this money would be invested for the benefit of Shasta and 1% would be used for management costs. Upon receipt, investor funds were deposited into Shimer's attorney escrow

account and then transmitted to Tech Traders. Tech Traders pooled the Shasta funds with its other investment funds and used them, in part, to trade exchange-traded commodity futures contracts and foreign currency contracts.

Over the course of their relationship with Tech Traders, the Equity Defendants reported tremendous trading profits, even though Shasta was actually losing substantial sums through Tech Traders and apparently failed to generate any profit whatsoever. The Equity Defendants further misled investors by representing that these profit numbers were verified by an independent CPA, Defendant Abernethy, whose results were then affirmed by a second CPA. The CFTC alleges that the Equity Defendants knew or should have known that neither CPA's review was independent and that the results were therefore unverified.

Shimer and Firth, representing themselves pro se, each filed motions for summary judgment on April 7, 2006.

II. Discussion

A. Standard

Although the Equity Defendants have filed three separate motions, each motion uses essentially the same arguments to dispute counts one, two, three, four and five in Plaintiff's Amended Complaint: that Plaintiff cannot establish that Shasta is a "commodity pool" which is a material fact

necessary to bring this action within the ambit of the Commodities exchange Act ("CEA").[1]

Summary judgment is only appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. Celotex, 477 U.S. at 330. The moving party may satisfy this burden by either (1) submitting affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) demonstrating to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's case. Id. at 331. If the moving party has not fully discharged its initial burden, its motion for summary judgment must be denied. Id. at 332.

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[1] Defendants asserted the same arguments in motions to dismiss filed on April 14, 2005. In denying those motions, this Court used the summary judgment standard. The Court stated that "because the parties' dispute [wa]s essentially one of law, founded on solely legal arguments, the standard this Court applie[d] in resolving the dispute [wa]s of little import." Commodity Futures Trading Comm'n v. Eguity Financial Group, LLC, et al., No. 04-1512, 2005 WL 2864784, at *2 (D.N.J. Oct. 4, 2005) (citing Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (holding that where the question the court must address is solely a question of law, there is "no real distinction in this context between the question presented on a 12(b) (6) motion and a motion for summary judgment.")). Therefore, in denying Defendants' motions for summary judgment, this Court uses the same analysis used in its Opinion of October 4, 2005.

B. Commodity Pool

Congress amended the Commodity Exchange Act and established the CFTC in 1974 in an attempt to insure "fair practice and honest dealing on the commodity exchanges and provid(e) a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." S. Rep. No. 1131, 93d Congo 2d Sess., reprinted in [1974] u.s. Code Congo & Ad. News, 5843, 5844; Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 883 (9th Cir. 1986). Defendants now argue that their company, Shasta, does not fall under the definition of a commodity pool. Therefore, Defendants argue that because Plaintiff cannot establish that Shasta is a commodity pool under the CEA, Plaintiffs likewise cannot establish all the elements of the five counts asserted in the Complaint.

For the purpose of the CEA, "(p)ool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." 17 CFR § 4.10(d)(1). As amended by Congress in 1992, a "commodity pool operator" is defined as:

> any person engaged in a business that is of the nature an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of

> trading in any commodity for future delivery on or subject to the rules of any contract market.

Pub L. No. 102-546, 106 Stat 3590 (1992).

A commodity pool is distinguished from other investment entities by the aggregation of investor funds into a single account. Funds from the account are then invested without regard to the source of specific funds, and the profits and losses are distributed pro rata among the investors. In Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880, 884 (9th Cir. 1986), the Ninth Circuit articulated four requirements to ascertain the presence of a commodity pool: "(1) an investment organization in which the funds of various investors are solicited and combined into a single account for the purpose of investing in commodity futures contracts; (2) common funds used to execute transactions on behalf of the entire account; (3) participants share pro rata in accrued profits or losses from the commodity futures trading; and (4) the transactions are traded by a commodity pool operator in the name of the pool rather than in the name of any individual investor." Id.; see also Nilsen v. Prudential-Bache Securities, 761 F. Supp. 279, 292 (S.D.N.Y. 1991) (citing Lopez, 805 F.2d at 884) ("Essentially, a commodity pool operator is one who manages an investment fund, similar to a mutual fund, in which the assets of several investors are invested together with gains or losses shared pro rata by the participants."); Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶ 21,107, p. 24,462 ("In a commodity pool, all investors' funds are placed in a

single account. Transactions are then executed on behalf of the entire account and not allocated to any particular investor. The investors' profits and losses are then allocated by shares to individual investors based on their contribution to the fund.").

Courts have been adamant that where funds are not actually commingled, a commodity pool does not exist. Thus, the Lopez Court held that the enterprise at issue was not a commodity pool because "not all accounts traded the same contracts," and "[t]herefore, not all accounts shared a pro rata profit or loss." Id. at 884. Similarly, in Meredith v. ContiCommodity Services, Inc., Comm. Fut. L. Rep. (CCH) ¶21,107, p. 24,462 (D.D.C.1980), a case relied upon in Lopez, the Court found that the fact that the funds were not pooled into a single account precluded the enterprise from being a commodity pool, since "the profitability of plaintiff's investment was actually dependent only upon [defendant's] success or failure in trading for plaintiff's account even if it was coincidental with the profitability of the accounts of other investors." Id. Although the defendant did not give each account individual consideration and often invested various investors' funds in similar enterprises, the funds were not actually pooled.

Unlike the defendant entities in Lopez and Meredith, Shasta actually pooled investor accounts. Shasta satisfies the four factors of the Lopez test: (1) the funds of individual investors were pooled in Defendant Shimer's equity account; (2) these

comingled funds were then transferred en masse to Tech Traders to be invested in commodity futures, without distinguishing between the funds of individual investors; (3) investors believed that gains from the Tech Traders operation would be allocated pro rata, depending on the relative amount of their investment; and (4) trades were made on behalf of the pool rather than in the name of individual investors. Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool.

The fact that Shasta did not invest in commodity futures directly, but instead transferred funds to Tech Traders to invest does not affect Shasta's status as a commodity pool. In fact, the Shasta transactions mirror those in Commodities Futures Trading Commission v. Heritage Capital Advisory Services, Ltd., Comm. Fut. L. Rep. (CCH) ¶21,627, p. 26,384 (N.D. Ill. 1982), another case formulating the basis for the Lopez decision. Heritage involved an operation very similar to Shasta: defendants solicited funds from individual customers, combined those funds into a common investment account [2] where the funds were commingled, and then gave those funds to a third party for investment in the futures market. In Heritage, the Court held that because investors expected to share profits and losses on a pro rata basis, the enterprise was a commodity pool, regardless of the fact that it was a third party who

[2] Defendants in Heritage actually deposited funds into two different accounts, both of which contained the commingled funds of a variety of customers.

conducted the actual investment activities. Id.

Defendants go to great lengths to argue that because the Shasta funds were not traded "in the name of Shasta" Shasta does not satisfy the fourth factor of the Lopez test and cannot be a commodity pool. Defendants' reading of the Lopez Court's language is far too literal. The Court intended the fourth factor to distinguish cases, such as Meredith, where investments are made in many of the same enterprises in the name of individual investors without pooling funds together in a single account. The appellation given the actual transaction is irrelevant, so long as it is a pooled fund and not conducted in the names of individual customer accounts. See In re Slusser, 1998 WL 537342 at n.36 (holding that entities at issue were commodity pools even though "[t]he pools were not traded in the name of the pool... [t]he key to the fourth factor is that the funds were not traded in the name of any individual investor, as was the case with the pools at issue here."). This pooling is clearly present here.

Besides arguing that Tech Traders did not invest Shasta's funds "in the name of Shasta," Defendants raise no evidence to suggest that Shasta is not a commodity pool. Accordingly, Defendants motions will be denied.

Dated: 11-16-2006

/s/Robert B. Kugler
Robert B. Kugler
United States District Judge

(Docket Nos. 334, 335)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff, Civil No. 04-1512 (RBK)

v.

ORDER

EQUITY FINANCIAL
GROUP, LLC, et. al.,
Defendants.

This matter having come before the Court upon motions for summary judgment by Defendants Vincent J. Firth and Robert W. Shimer; and the Court having considered the moving papers and the opposition thereto; and for reasons expressed in the Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motions fort Summary Judgment are DENIED.

Dated: 11/16/2006

/s/ Robert B. Kugler
Robert B. Kugler
United States District Judge

NOT FOR PUBLICATION (Docket No. 336)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC, et. al.,
Defendants.

Civil No. 04-1512 (RBK)

OPINION

KUGLER, United States District Judge:

Before the Court is a motion by Plaintiff Commodity Futures Trading Commission for partial summary judgment against Defendants Equity Financial Group, Robert W. Shimer and Vincent J. Firth with respect to charges that they violated 7 U.S.C. §§ 6k(2), 6m, and 6*o*(1) of the Commodities Exchange Act, pursuant to Federal Rule of Civil Procedure 56. In addition, Plaintiff moves for summary judgment with respect to the charge that Defendant Shimer aided and abetted Equity's § 6m violation and Tech Traders' violation of 17 C.F.R. §4.30. For the reasons provided below, Plaintiff's motion will be granted in part and denied in part.

"make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." Serbin, 96 F.3d at 69 n.2 (quoting Celotex, 477 U.S. at 322); Heffron v. Adamar of New Jersey, Inc., 270 F. Supp. 2d 562, 568-69 (D.N.J. 2003).

B. 7 U.S.C. § 6m(1)

Plaintiff CFTC alleges that because Equity failed to register with the CFTC as a Commodity Pool Operator ("CPO"), Equity violated 7 U.S.C. §6m(1) when it allegedly used instrumentalities of interstate commerce, such as the telephone and the mail, in connection with its business as a CPO. Equity Defendants do not directly address this count in their opposition papers.[1] Rather, they continue to insist that Shasta is not a commodity pool," the threshold issue for bringing this action under the jurisdiction of the CFTC.

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[1] In fact, Defendants do not directly address any of the counts for which Plaintiff moves for summary judgment. Rather, Defendants spend the majority of their brief pointing to the immateriality of Plaintiff's evidence, the "abusively overlong" nature of Plaintiff's list of material facts, as well as Plaintiff's alleged distortion of the facts. However, Defendants dispute few of the facts crucial to the counts at issue in Plaintiff's motion.

Defendants claim that they do not have sufficient space to adequately oppose Plaintiff's summary judgment motion; however, the Court finds that Defendants had more than enough pages to raise genuine issues of material fact with regard to the counts and issues at hand had they not engaged in the digressions listed above.

The Commodity Exchange Act ("the "Act") requires a CPO to register with the Commission. 7 U.S.C. § 6n. The Act prohibits unregistered CPOs from "ma[king] use of the mails or any means or instrumentality of interstate commerce in connection with his business as [a CPO]. 7 U.S.C. § 6m(1)

This Court previously held that Shasta constituted a commodity pool. See Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2006 WL 3359418 (D.N.J. Nov. 16, 2006); see also Commodity Futures Trading Comm'n v. Equity Fin. Group, No. 04-1512, 2005 WL 2864784 (D.N.J. Oct 4, 2005). Likewise, the Court concludes that Equity is the CPO for Shasta, because Equity solicited funds from investors, pooled those funds, and invested them in futures trading through Tech Traders. (Aff. Stephen Bobo at ¶ 5); see also 7 U.S.C. § 1a(4) (defining "commodity pool operator" as "any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts or receives from others, funds...for the purpose of trading in any commodity for future delivery... .")

Other than disputing that Shasta is a "commodity pool" a question of law already decided by this Court, the Equity Defendants do not raise a genuine issue of material fact to dispute Equity's status as a CPO. In addition, it is not disputed that Equity is not registered with the CFTC in any capacity.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 08-1558, 08-1838 & 08-2495

COMMODITY FUTURES TRADING COMMISSION
v.
EQUITY FINANCIAL GROUP LLC;
TECH TRADERS, INC.; VINCENT J. FIRTH
ROBERT W. SHIMER; J. VERNON ABERNETHY;
COYT E. MURRAY; MAGNUM CAPITAL
INVESTMENTS, LTD.; MAGNUM INVESTMENT,
LTD; TECH TRADERS, LTD.

Robert W. Shimer,
Appellant at No. 08-1558

Vincent J. Firth,
Appellant at No. 08-1838

Equity Financial Group, LLC,
Appellant at No. 08-2495

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 1-04-cv-01512
(Honorable Robert B. Kugler)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,
SLOVITER, MCKEE, RENDELL, BARRY, AMBRO,
FURENTES, SMITH, FISHER, CHAGARES,
JORDAN and HARDIMAN, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: 9 September 2009

CLD-271 June 14, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 07-1433

COMMODITY FUTURES TRADING COMMISSION

VS.

EQUITY FINANCE GROUP LLC; TECH TRADERS, INC.; VINCENT J. FIRTH; ROBERT W. SHIMER; J. VERNON ABERNETHY; COYT E. MURRAY; MAGNUM CAPITAL INVESTMENTS, LTD.; MAGNUM INVESTMENTS, LTD.*

Robert W. Shimer; Vincent J. Firth,
Appellants

(*Amended per order of 4/25/07)
(D.N.J. CIV. NO. 04-CV-01512)

Present: RENDELL, SMITH & JORDAN, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;
(2) Appellee's motion to dismiss for lack of jurisdiction
(3) Appellants' jurisdictional response;
(4) Appellee's reply to Appellants' jurisdictional response;

(5) Appellant Shimer's response to Appellee's reply; and
(6) Appellant Firth's response to Appellee's reply in the above-captioned case.

Respectfully,

Clerk

MMW/KLB/clc

ORDER

The foregoing Appellee's motion to dismiss the appeal for lack of appellate jurisdiction is granted because the orders appealed from are neither final nor appealable at this time. A final order must end the litigation as to all claims and all parties. Jackson v. Hart, 435 F.2d 1293, 1293 (3d Cir. 1970). The District Court has not expressly directed entry of judgment, Fed. R. Civ. P. 54(b), and the collateral order doctrine does not apply. See Bell Atlantic-Pa. v. Pa. Pub. Util. Comm'n, 273 F.3d 337, 342 (3d Cir. 2001); Carver v. Foerster, 102 F.3d 96, 98 (3d Cir. 1996). Appellants may pursue their appeal of the District Court's entry of partial summary judgment following the disposition of the remaining claims.

By the Court,

/s/ Kent A. Jordan
Circuit Judge

Dated: July 6, 2007
CLC\cc: Mr. Vincent Firth Robert W. Shimer
Merry Lymn, Esq.